INDEX.

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	3
Reasons for granting the writ	5
Conclusion	19
Appendix A—Agreement	21
B—Assignment	31

TABLE OF CASES.

Calcote v. Texas Pacific Coal and Oil Co., (5th C. C. A., 1946) 157 F. (2d) 216	18
Champlin Refining Co. v. Corporation Commission, (1932) 286 U. S. 210, 76 L. ed. 1062	11
Gruger v. Phillips Petroleum Co., (Okla., 1943) 192 Okl. 259, 135 P. (2d) 485	11
Kentucky Natural Gas Corp. v. Duggins, et al., (6th C. C. A., 1948) 165 F. (2d) 1011	18
Kolachny v. Galbreath, 26 Okl. 772, 110 Pac. 902, 38 L. R. A. (NS) 451	12
Ohio Oil Co. v. Sharp, (10th C. C. A., 1943) 135 F. (2d) 303-307	12
Palmer Oil Corp. v. Phillips Petroleum Co., ... Okl. ...., 231 P. (2d) 997, 1012-1013	2
Rich v. Doneghey, 71 Okl. 204, 177 Pac. 86-89, 3 A. L. R. 352	12
Shields v. Barrow, 17 How. 130, 15 L. ed. 158	18
State of Washington v. The United States, (9th C. C. A., 1936) 87 F. (2d) 421	18
Utility Production Corp. v. Riddle, et al., (Okla., 1932) 161 Okl. 99, 16 P. (2d) 1092	18

JUDICIAL CODE.

Section 240 of the Judicial Code as amended, Title 28, U. S. C., 1254(a)	2

STATUTE.

Rule 19, Federal Rules of Civil Procedure	17

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1951.

No. _____

The Carter Oil Company, *Petitioner,*

vs.

T. H. McCasland, N. W. Brillhart, Glenn Norville, Charles R. Rider, Thomas H. McCasland, Jr., Trust; Mary Frances McCasland, Trust; John Flack Burton, Trust; and James Leslie Burton, Trust,
Respondents.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on July 10, 1951.

Opinions Below.

There was no written opinion by the United States District Court for the Eastern District of Oklahoma. The opinion of the Court of Appeals is reported in ... F. (2d) ....

Jurisdiction.

(*1*) The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended, being Title 28, U. S. C. 1254(a).

(*2*) The opinion (R. 289) and judgment (R. 305) of the Court of Appeals sought to be reviewed were filed on July 10, 1951. Under a 15-day extension (R. 305) petition for rehearing was filed August 9, 1951, (R. 305-307), and the court entered an order denying such petition on August 17, 1951 (R. 307, 308).

Questions Presented.

The questions presented by this petition are:

(*1*) Whether this Court should grant certiorari under the authority of the Oklahoma Supreme Court decision, *Palmer Oil Corporation* v. *Phillips Petroleum Company*, ... Okl. ..., 231 P. (2d) 997, 1012-1013, as determinative of a local question of law contrary to the decision herein.

(*2*) Whether this Court should grant certiorari because the court below departed from the established law of the State of Oklahoma in that it refused to apply the Rule of Capture in arriving at the rights of the parties under the contract and assignment herein involved, which have to do with oil and gas rights.

(*3*) Whether under said contract and assignment respondents have the right, to the exclusion of petitioner, to take all of the oil from the Woods Sand formation through their wells bottomed above the depth of 4,000 feet, or whether under that contract and assignment petitioner has the right to drill wells into the Woods Sand formation below the depth of 4,000 feet and produce oil therefrom.

(4) The court below was without jurisdiction for want of indispensable parties to the suit.

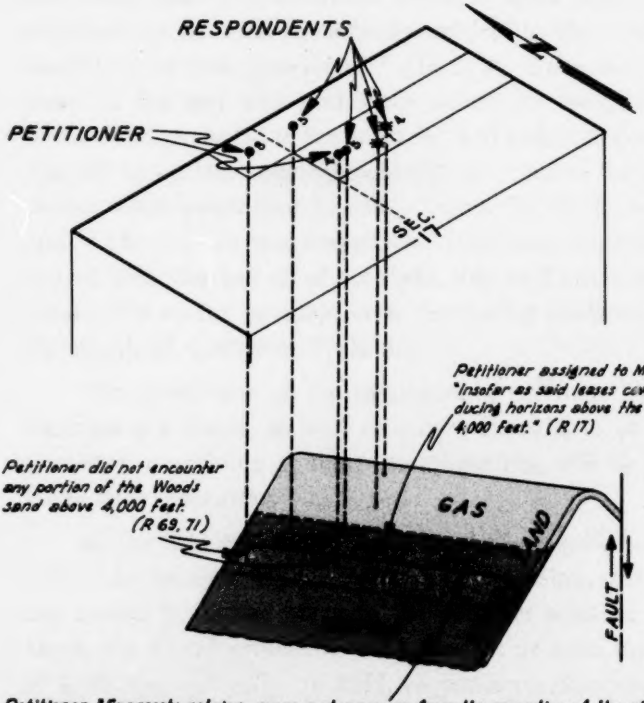
Statement.

This was a suit for a declaratory judgment instituted by respondents in the United States District Court for the Eastern District of Oklahoma under Chapter 151 of the Judicial Code (28 U. S. C. A. 2201-2202) wherein respondents sought to determine the rights between them and petitioner under a certain contract (R. 7) and assignment (R. 16) affecting oil and gas mining leases covering lands in Grady County, Oklahoma. For convenience the contract is appended hereto as Appendix A and the assignment as Appendix B. The controversy revolved around respondents' right to drill for and produce all of the oil from what is called the Woods Sand formation which underlies the leases in question to the exclusion of petitioner. A decree was rendered in favor of respondents granting them the full right to take all of the oil from that formation and denying petitioner any right to take oil therefrom (R. 39). Petitioner appealed to the United States Court of Appeals, Tenth Circuit, where the decree of the trial court was affirmed (R. 305).

The contract, in the vernacular, is called a "farmout," whereby an oil and gas operator having large oil and gas lease holdings which he wishes to have developed but cannot himself develop timely "farms out" certain of such holdings to another with provision for drilling a test well, the farmor retaining a small interest in the production, if any, secured by the farmee.

The contract was entered into between petitioner and respondent, T. H. McCasland, January 31, 1939, (the other respondents are his assignees) and under it petitioner

PERSPECTIVE
of
WOODS SAND FORMATION
UNDER OIL & GAS LEASES IN QUESTION


RESPONDENTS
PETITIONER
SEC. 11
Petitioner assigned to McCasland "insofar as said leases cover producing horizons above the depth of 4,000 feet." (R 17)
Petitioner did not encounter any portion of the Woods sand above 4,000 feet. (R 69, 71)
GAS
AND
FAULT

Petitioner "Expressly retains, saves and reserves from the operation of the within Assignment and unto itself, its successors and assigns, all right, title and interest in and to Tracts 1, 2, 3 and 4, above, insofar as they cover producing horizons below the depth of 4,000 feet, together with the right of ingress and egress for the purpose of exploring for and producing oil, gas and casinghead gas therefrom." (R 18)

question. This was a gas well and never produced any oil (R. 166). Further drilling in the area and on the leases demonstrated that the Woods Sand formation was a slanting one with a tilt or dip of about 58° (R. 117). The drilling further demonstrated that said formation was a long narrow one extending across country about two and one-half miles; (R. 79) that it had about 1,100 feet of producing oil sand (R. 90); that the producing portion of this sand was bisected by the 4,000 foot line of demarcation provided for in the contract so that paying oil wells could be had therein both above and below the depth of 4,000 feet. Respondents drilled paying oil wells on the leases in question into the Woods Sand formation at a point slightly above 4,000 feet, and petitioner also drilled paying oil wells therein at a point slightly below 4,000 feet. The wells drilled by petitioner did not drill into the Woods Sand formation at any point above the depth of 4,000 feet, but each well first encountered that formation below the depth of 4,000 feet. (R. 69, 71) After completion of petitioner's wells, respondents instituted this action claiming that petitioner had no right to produce oil from the Woods Sand formation because they say they encountered it above 4,000 feet and, if not hindered by wells drilled below 4,000 feet, they can secure all of the oil therefrom, and that, therefore, petitioner is precluded from drilling any wells into the Woods Sand formation below the depth of 4,000 feet and producing oil therefrom. An illustrative plat appears on the opposite page.

Reasons for Granting the Writ.

1. The decision of the court below is in conflict with the decision in *Palmer Oil Corporation* v. *Phillips Petroleum Company, et al.*, ... Okl. ..., 231 P. (2d) 997, 1012-1013, recently decided by the Oklahoma Supreme Court, be-

ing the court of last resort therein. The case is now on appeal in this Court on constitutional grounds. To determine that the conflict exists and also to know whether the decision in the instant case is right or wrong, it is necessary to put before the court the provisions of the farmout contract and of the assignment herein involved.

The contract, in the "whereas" clause, provided that petitioner would assign to McCasland its rights in the leases:

> "* * * in so far as they cover the properties described above and in so far as they cover producing horizons above the depth of 4,000 feet, subject to the terms and provisions of this agreement."

Paragraph 2 of the contract, which prescribes the time when and the conditions under which the assignment will be delivered, recites that Carter will make such assignment on its usual form:

> "* * * assigning to McCasland the oil and gas leasehold estates on the properties heretofore described above the depth of 4,000 feet, such assignments to be made specifically subject to the terms and conditions of this agreement."

The assignment issued to McCasland pursuant to the contract assigns to him the leases in question:

> "* * * in so far as said leases cover producing horizons above the depth of 4,000 feet."

The assignment contains a definite reservation to petitioner which says this:

> "Assignor further expressly retains, saves and reserves from the operation of the within assignment and unto itself, its successors and assigns, all right, title and interest in and to Tracts 1, 2, 3 and 4 above, in so

far as they cover producing horizons below the depth of 4,000 feet, together with the right of ingress and egress for the purpose of exploring for and producing oil, gas and casinghead gas therefrom."

The *Palmer* case was decided by the Oklahoma Supreme Court March 20, 1951, after the decision herein by the lower court, but before the decision in the Court of Appeals. Petitioner called it to the attention of that court by Supplemental Brief. The case involved the constitutionality of a unitization act adopted by the Oklahoma Legislature whereunder oil and gas leases covering a common source of supply might be consolidated and operated as one lease. Each owner of a lease or interest would then have a fractional interest in the entire consolidated acreage or unit based upon the extent of his holdings under particular tracts included in that unit. The Oklahoma Supreme Court upheld the validity of the act and went on to pass upon a particular controversy in the lawsuit between Palmer Oil Corporation and Gulf Oil Corporation which parallels the issue presented here. The opinion reflects (p. 1012) that there had been a unitization of the West Cement Medrano formation under the authority of the unitization act there in question. In order properly to distribute the proceeds from the sale of the oil from the unit, it was necessary to know the amount of recoverable oil under each tract so as to know what the lessee of that tract might have credit for as though he had produced it. Gulf Oil Corporation had assigned to Palmer Oil Corporation all of its right, title and interest in a certain oil and gas lease to a depth of 6,000 feet, "retaining the lease as to the oil, gas and casinghead gas, together with all the rights, privileges and appurtenances thereunto belonging below the depth of 6,000 feet." It happened that the 6,000-foot division line passed

through the Medrano sand by reason of which there was productivity in the sand above and below that line. Such is exactly the case here. Palmer, before the unitization, had drilled a well on the lease to the Medrano sand bottomed above 6,000 feet which produced oil. Gulf, at the time of the unitization, had not drilled any well in the Medrano sand below the depth of 6,000 feet. After unitization Gulf could not drill because then the drilling was in the hands of the management of the unit. Notwithstanding Gulf had not drilled a well below the 6,000-foot line, the Oklahoma Corporation Commission, in fixing the percentage Gulf was to have in the unit, allowed Gulf credit for the oil which lay below 6,000 feet in the Medrano sand. Palmer Oil Corporation protested this action of the Commission on the ground that it could secure the oil in the Medrano sand which lay below 6,000 feet through the well it had already drilled and that it had a right to take all of that oil to Gulf's exclusion and that hence it was entitled to full credit in the unit for that oil. The Oklahoma Supreme Court held that the Commission was correct in awarding Gulf credit for the oil in the Medrano sand under the leased land below the depth of 6,000 feet. Why was Gulf given credit for this oil? The question admits of only one answer. Such credit could be given to Gulf only because the court concluded that Gulf had the right to drill for and produce the oil in the Medrano sand lying below 6,000 feet. The lower court, in commenting upon the *Palmer* case says: "It was a proration case and did not involve the right of more than one person or company to drill into a common source of supply and produce oil therefrom." (R. 294) The court's comment is incorrect because, as above demonstrated, the right to drill for and produce oil was exactly what the court was determining in the *Palmer* case in order that it

might award each participant in the unit its fair share of the proceeds. If, by virtue of the provisions of its contract, Gulf had deprived itself of the right to have any oil in the Medrano sand below 6,000 feet, then there would be no possible basis upon which Gulf could have been awarded any interest in that sand under the lease in question.

The only other differentiation which the lower court seeks to make between this case and the *Palmer* case goes to the language of the two contracts and the court says the cases are distinguishable because the assignment in the *Palmer* case "did not, as here, contain the words 'producing horizon'." Suppose the assignment in the *Palmer* case had contained the words "producing horizon" just as it did here. What possible difference could that have made when Gulf was retaining exactly the same rights in that horizon below 6,000 feet that it was granting to Palmer above 6,000 feet. Obviously there is no valid differentiation. In our own case we granted to McCasland producing horizons above the depth of 4,000 feet and we retained, in identical language, producing horizons below the depth of 4,000 feet with full right of ingress and egress to produce oil. It is difficult to see just why the court below concluded that because we employed the term "producing horizon" in reference to rights granted to McCasland, he has the right to produce all of the oil in the Woods Sand formation to our exclusion when we reserved and retained the identical rights in that formation at and below the depth of 4,000 feet. The court below took pains to define the term "producing horizon" and said: "In fine, the term 'producing horizon' means the point at which a pool, reservoir or common source of supply of oil or gas is encountered and from which the oil therein may be extracted." (R. 294)

Accepting this, for the purposes hereof, as a correct definition, does it actually throw any light upon the rights of the parties to the contract? It merely says that a producing horizon is a place where oil is encountered, but in no sense does it explain why McCasland is entitled to all of the oil in the Woods Sand formation when the contract clearly grants the right to drill wells into that formation only above the depth of 4,000 feet and when just as clearly petitioner retained that right below 4,000 feet. The presence of the term "producing horizon" in petitioner's contract with McCasland carries no significance in the light of the rights fixed by a definite line of demarcation just as they were fixed in the *Palmer* case, and the cases are not distinguishable. We are supported in this assertion by Chief Judge Orie L. Phillips of the court below who cites the *Palmer* case in support of his dissenting opinion (R. 304).

Since the correctness of the decision in the *Palmer* case is challenged in this Court only upon the constitutionality of the unitization act, it follows that, notwithstanding the case may be reversed on that ground, the decision of the Oklahoma Supreme Court as to the interpretation of the Palmer farmout contract will not be erased, but will stand as a pronouncement of the Oklahoma Supreme Court as to the true and proper interpretation of such contracts and will be indicative of that court's holding in any future case which may be brought before it involving such interpretation.

2. The court below refused to apply the Rule of Capture in arriving at the rights of the parties under the contract and assignment. The Rule of Capture is a familiar one in Oklahoma and has been invariably applied to govern the rights of oil operators in the production of oil under

their lease contracts. This rule gives to each oil and gas lessee the right to produce all of the oil he can bring to the surface on wells drilled on his leased land even though a substantial portion of that oil may be drained from the adjoining property. The rule is recognized as being the law of Oklahoma by this Court in *Champlin Refining Company* v. *Corporation Commission,* (1932) 286 U. S. 210, 76 L. ed. 1062, where it says:

> "In Oklahoma, as generally elsewhere, land owners do not have absolute title to the gas and oil that may permeate below the surface. These minerals, differing from solids in place such as coal and iron, are fugacious and of uncertain movement within the limits of the pool. *Every person has the right to drill wells on his own land and take from the pools below all the gas and oil that he may be able to reduce to possession including that coming from land belonging to others,* but the right to take and thus to acquire ownership is subject to the reasonable exertion of the power of the State to prevent unnecessary loss, destruction or waste." (Italics ours.)

The rule has obtained throughout and still obtains. Thus, the Supreme Court of Oklahoma more recently said in *Gruger* v. *Phillips Petroleum Company,* (Okla., 1943) 192 Okl. 259, 135 P. (2d) 485:

> "The law of capture, under which oil and gas is owned by the one lawfully reducing it to possession, still obtains in Oklahoma, except as it has been or may be regulated or restricted under laws passed in the exercise of the police power, such as the proration and spacing statutes and city zoning ordinances. Those laws do not abrogate the law of capture. They are not self-executing. They simply authorize administrative boards to issue orders that have the effect of regulating or abrogating in a measure the law of capture."

There is no claim here that there is any statute, ordinance or administrative order affecting the rights of the contending parties.

From a consideration of this Rule of Capture, it is obvious that an oil and gas lessee in Oklahoma has no title to the oil and gas in place. He has merely the right to drill for and to produce that oil and gas and, in the absence of a limiting statute or order, he may have all he can find. This has been the law in Oklahoma throughout. *Kolachny* v. *Galbreath,* 26 Okl. 772, 110 Pac. 902, 38 L. R. A. (NS) 451, and *Rich* v. *Doneghey,* 71 Okl. 204, 177 Pac. 86-89, 3 A. L. R. 352. The court below acknowledges such to be the rule in Oklahoma in *Ohio Oil Company* v. *Sharp,* (10th C. C. A., 1943) 135 F. (2d) 303, 307, where it said:

> "Title to oil and gas under lands in Oklahoma is defined as the exclusive right (subject to legislative control), to erect structures on the surface of the land, to explore and prospect for oil and gas by drilling wells through the underlying strata; to reduce to possession and thus acquire absolute title as personal property to the oil and gas found and obtained thereby. It has been classified as an incorporeal hereditament or a profit *a prendre,* absolute title to which does not vest until reduced to actual possession."

It is, therefore, abundantly clear that petitioner never had title to any specific oil bearing formation or to the oil therein, but that it had only a right under its oil and gas lease to drill for and produce such oil as it could find. It granted the right to McCasland to drill for and produce oil from formations or, so-called, producing horizons above the depth of 4,000 feet, but it retained the right to produce oil in those formations below the depth of 4,000 feet. The fact that it developed that there was a tilting formation whose pro-

ducing area was bisected by the 4,000-foot line cannot alter the rule. Each of the parties, under the contract and assignment, had the right to produce all of the oil he could find on his side of the line just as he would if the line had been a surface line, and if, for example, petitioner had owned a lease covering a 160-acre tract and had farmed out to respondents under an identical contract the east 80 and kept the west 80 with full right of ingress and egress to produce oil. Then most certainly, with all of the other facts here present, petitioner would have the right to drill for and produce oil on the west 80 regardless of what respondents might find or be able to produce through a well drilled on the east 80. No reason presents itself and none is given in the opinion of the court below why petitioner should not have the same right with respect to its retained portion below the depth of 4,000 feet. If the Woods Sand formation should extend below 4,000 feet under an adjoining lease included in the contract whereunder the mineral owners differ from those under the lease where respondents have drilled their well, then, under the lower court's decision, it would not be possible to pay the mineral owners the proper portion of their royalty under the leases. The court below arbitrarily awards respondents the right to take all of the oil in the Woods Sand formation and makes no effort to analyze or solve the questions created by its action.

3. The introductory sentence of the opinion of the court below states:

> "This was an action for a declaratory judgment, in which appellees sought a declaration of rights between them and appellants under a contract and an assignment, assigning to appellees certain rights in and

to oil and gas producing horizons *encountered* at a depth of less than 4,000 feet." (R. 289)

If this statement were correct and if we had made no similar reservation, then the court below would have had some basis for its decision. But the statement is absolutely incorrect in a very vital particular which is that it supplies the word "encountered," which is nowhere found in our contract or assignment. Not content with its initial statement, the court below, farther on in its opinion (R. 292), again featured the word "encountered" thus:

> "* * * the crux of the controversy is whether Carter, having assigned the right to drill for and produce oil and gas from a producing horizon, *encountered* above 4,000 feet, * * *"

By some process not explained the court below reads the word "encountered" into those portions of the contract and assignment granting rights to McCasland, but does not do likewise with those portions of the instruments reserving rights to petitioner. If it is possible to interpret the language employed by petitioner assigning rights above 4,000 feet to mean that it assigned all of the oil in producing horizons *encountered* above that depth, then by the same token, the language it employed in reserving and retaining producing horizons below the depth of 4,000 feet must, of necessity, mean that petitioner retained all of the oil in all producing horizons it *encountered* below 4,000 feet, and, if both the grant and the reservation mean that, then obviously they reach a complete impasse. As a matter of fact, petitioner said nothing at all in its contract and assignment about horizons *encountered* above or below 4,000 feet.

The court below interpreted the contract and assignment without giving any effect to the very plain and direct

phrases which are capable of only one meaning, namely, "above the depth of 4,000 feet" and "below the depth of 4,000 feet." No one can misunderstand these words and no other words can be supplied to make them any plainer. Hence, actually it makes no difference what the meaning of the term "producing horizon" may be. The 4,000-foot line determined what each party to the contract was to have in any producing horizon, whether it was above, below or bisected by that line. The language was "perfectly clear" to Chief Judge PHILLIPS of the court below, who in his dissenting opinion said (R. 302, 303):

> "The language of the granting clause and of the reservation in the assignment makes it perfectly clear that Carter reserved all of its right, title and interest in producing horizons below the depth of 4,000 feet to the same extent that it granted all its right, title and interest in producing horizons above the depth of 4,000 feet. The wording of the grant is identical with the wording of the reservation, except one refers to producing horizons above and one refers to producing horizons below the 4,000-foot level. A substantial portion of the Woods Sand formation lies above and a substantial portion thereof below the 4,000-foot level. It would be as logical to say that such producing horizon lies below the 4,000-foot level and that Carter, under the reservation in its assignment, is entitled to produce all the oil from such formation if it can do so by wells drilled into the formation below the 4,000-foot level as it is to say that such formation lies above the 4,000-foot level and that McCasland, under the assignment, is entitled to produce all the oil from such formation if it can do so through wells drilled into the formation to a depth of not greater than 4,000 feet. The fact is that the formation lies partly above and partly below. The contract expressly provided that Carter should

have the right in the future to drill and operate wells on the leases below the depth of 4,000 feet."

The court below does not undertake to answer the argument of Chief Judge PHILLIPS because it cannot answer.

A consideration of the contract as a whole and of the assignment demonstrates beyond peradventure that, in truth, the term "producing horizon" had no particular meaning to either of the parties to the contract. Let the Court note that in paragraph 2 of the contract (R. 8) no reference at all is made to producing horizons. The words do not appear therein; yet this is the working or vitalizing provision of the contract which calls for the issuance of the assignment upon certain conditions. We ask the Court to look further to paragraph 11 of the contract (R. 14) where it is recited that McCasland, in drilling any wells on the premises to be assigned, shall do so in such a manner as not to interfere with respect to:

> "* * * wells which may hereafter be drilled and operated on said premises below the depth of 4,000 feet." (R. 14)

That is a very plain statement and it makes no reference to producing horizons, and it shows very clearly what is meant by the entire contract throughout, to-wit, that petitioner was entitled to drill for and have all of the oil it could find below the depth of 4,000 feet.

The court below thought that the parties to the contract did not intend that both should produce oil from the same producing horizon. That conclusion could not be based upon any testimony going to petitioner's intention because all of the competent testimony on that score was to the effect that petitioner did so intend (R. 233, 245). The contract itself negatives this idea. There were producing wells

on the property in a shallower formation at the time the farmout agreement was made. These wells did not pass under the agreement, but McCasland, under paragraph 11 of the contract was entitled to drill wells into that formation, provided he did not drill on any 10-acre tract where a well was already producing.

4. The court was without jurisdiction to decide this case because respondents failed to make the mineral owners under the leased lands parties to the suit and those owners are indispensable to a determination of the question.

Rule 19 of the Federal Rules of Civil Procedure, in so far as we are here concerned, provides:

> "(a) *Necessary Joinder.* Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff."

Rule 23 deals with class actions and Subdivision (b) of 19 deals only with the effect of failure to join persons who are not indispensable.

There is payable by the lessee to the mineral owners under the leased lands in the aggregate the proceeds of 1/8th of the oil produced, which is called a Royalty Interest (R. 278, 282). Under the judgment of the court below petitioner is denied the right to drill into the Woods Sand below the depth of 4,000 feet and produce oil therefrom. Respondents cannot drill into the Woods Sand below that depth because their right to drill is restricted to depths above 4,000 feet. Although petitioner cannot drill that formation below that depth, yet it still has an oil and gas lease thereon. Hence, no one can drill the Woods Sand formation

below 4,000 feet and produce oil therefrom. Petitioner, under the judgment of the court, must abandon the wells it now has in the Woods Sand formation. The mineral owners, therefore, are deprived entirely of their Royalty Interest from those wells. Since they were not made parties to the lawsuit, no fact has been determined as to them. They have been deprived of a valuable right without a hearing. This is directly contrary to *Shields* v. *Barrow,* 17 How. 130, 15 L. ed. 158, and to the decisions in the cases, *Utility Production Corporation* v. *Riddle, et al.,* (Okla., 1932) 161 Okl. 99, 16 P. (2d) 1092; *Calcote* v. *Texas Pacific Coal and Oil Company,* (5th C. C. A., 1946) 157 F. (2d) 216; *Kentucky Natural Gas Corporation* v. *Duggins, et al.,* (6th C. C. A., 1948) 165 F. (2d) 1011; and *State of Washington* v. *The United States,* (9th C. C. A., 1936) 87 F. (2d) 421.

The decision of the court below is unique in that it is the first one of which we know to apply the Law of Discovery to operations for oil and gas. That law has long been applied to lode mining operations for solid minerals, but it has never before been applied in oil and gas controversies. In this respect the decision of the court below is a complete departure from all of the established law of the State of Oklahoma going to a controversy of this sort.

Above all we urge that the Court should not have ignored the 4,000 foot limitation and should not have added the word "encountered" to the term "producing horizon," and after having done both, certainly should not have given the words "producing horizons encountered above (or below) the depth of 4,000 feet" a different interpretation as to respondents than as to petitioner. The court below does not attempt to give any reason for its action because there is no sufficient reason.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari to the Court of Appeals, Tenth Circuit, should be granted.

Respectfully submitted,

VILLARD MARTIN,
National Bank of Tulsa Bldg.,
Tulsa, Oklahoma,

GARRETT LOGAN,
National Bank of Tulsa Bldg.,
Tulsa, Oklahoma,

FORREST M. DARROUGH,
P. O. Box 801,
Tulsa, Oklahoma,

ALFRED STEVENSON,
Holdenville, Oklahoma,

Counsel for Petitioner.

WALTER DAVISON,
P. O. Box 801,
Tulsa, Oklahoma,

Of Counsel.

Appendix A.

"Agreement.

"This Agreement, Made and entered into this 31st day of January, 1939, by and between The Carter Oil Company, a West Virginia Corporation, hereinafter called Carter, as First Party, and T. H. McCasland of Duncan, Oklahoma, hereinafter called McCasland, as Second Party.

"Witnesseth That

"Whereas, Carter represents that it is the owner of oil and gas mining leases covering the full interest in the following described lands in Grady County, Oklahoma, to-wit:

Tract 1: (L-20179) Northwest Quarter of Northeast Quarter of Southwest Quarter (NW4 of NE4 of SW4) of Section 8, Township 5 North, Range 5 West.

Tract 2: (L-20126) Southeast Quarter of Southeast Quarter (SE4 of SE4) of Section 8, and North Half of North Half of Northeast Quarter (N2 of N2 of NE4) and Northeast Quarter of Northeast Quarter of Northwest Quarter (NE4 of NE4 of NW4) of Section 17, Township 3 North, Range 5 West.

Tract 3: (L-18985) South Half of North Half of Northeast Quarter (S2 of N2 of NE4) of Section 17, Township 3 North, Range 5 West,

and represents that it is the owner of an undivided ½ interest in an oil and gas mining lease covering the following described lands in Grady County, Oklahoma, to-wit:

Tract 4: (L-20126) West Half of Southeast Quarter (W2 of SE4) and East Half of East Half of Southwest Quarter (E2 of E2 of SW4) of Section 8, Township 3 North, Range 5 West, and

"Whereas, the parties hereto have arrived at an agree-

ment whereby Carter is to assign to McCasland its rights in and to said leases in so far as they cover the properties described above, and in so far as they cover producing horizons above the depth of 4,000 feet, subject to the terms and provisions of this agreement:

"Now, Therefore, it is agreed by and between the parties hereto as follows:

"I.

"Without delay after execution of this agreement, Carter shall deliver to McCasland abstracts and title papers in its file evidencing its ownership of the oil and gas leases on the properties described above. McCasland shall have ten (10) days after receipt of such abstracts and title papers to cause same to be examined by his attorneys and to submit title opinions thereon. Carter shall have ten (10) days thereafter to comply with any requirements so made. In the event Carter is unable to meet any of the requirements so made, McCasland may elect to waive same, but in any event, shall be required to accept or reject titles at the expiration of the last ten (10) days' period referred to above. After the examination has been completed, all abstracts and title papers furnished for examination shall be returned to Carter, McCasland thereafter to have the privilege of borrowing the same.

"II.

"Upon demand after approval of titles and commencement of the actual drilling of the test well hereinafter provided for, Carter agrees to make, execute and deliver to McCasland assignments in writing on Carter's usual form, and without warranty of title, assigning to McCasland the oil and gas leasehold estates on the properties heretofore described, above the depth of four thousand (4,000) feet, such assignments to be made specifically subject to the terms and conditions of this agreement.

"III.

"After approval of titles, and on or before February 18, 1939, McCasland agrees to commence the actual drilling

of a test well for oil and gas upon a twin location in the approximate center of Tract 1 above described, and to continue the drilling thereof with due diligence to a depth sufficient to thoroughly test the 2,800-foot horizon, and to a depth sufficient to fulfill offset requirements created by the No. 1-A B. A. Horton well, which is located in the approximate center of the Southeast Quarter of Southeast Quarter of Northwest Quarter (SE4 of SE4 of NW4) of Section 8, Township 3 North, Range 5 West, which has heretofore been completed to the so-called 2,800-foot sand. McCasland shall not be required to continue the drilling of said test well in the event granite or other impenetrable substances are encountered therein at a depth less than that provided for above.

"IV.

"During the course of the drilling of the test well hereinabove provided for, satisfactory tests shall be made of all possible producing horizons, especially of all formations showing either oil or gas. Should a showing of oil or gas be encountered at any depth in said well, McCasland shall immediately notify Carter thereof so that it may have a representative present to witness the testing of said showing, and if Carter so requests, casing shall be properly set and the well bailed, and such other things done as are necessary to make a satisfactory test of the production. Carter, through its agents and representatives, at all times shall have access to said well to inspect the drilling thereof, and shall have access to any cores taken in connection with said drilling operations. At its own election and at its own risk and expense, Carter shall have the right to lower geophone into said well for the purpose of taking seismic velocity tests prior to the abandonment thereof in the event it is a dry hole or ceases to produce. If directional or straight hole surveys are made, McCasland shall furnish Carter, at its office in Tulsa, Oklahoma, a complete report thereof.

"In the drilling of said test well, mud of sufficient spe-

cific gravity and viscosity shall be used to return good cuttings such as are satisfactory to Carter's District Geologist, D. L. Hyatt, 410 Gilbert Building, Ardmore, Oklahoma, and samples of such cuttings and of the formations penetrated shall be furnished Carter at its office in Tulsa, Oklahoma. Upon completion of said well, McCasland shall furnish Carter, at its office in Tulsa, Oklahoma, a full and complete report of the formations penetrated.

"V.

"The cost of drilling the test well provided for above, and all other costs and expenses incurred in connection with the developing and operating of said premises, shall be entirely free of cost to Carter.

"VI.

"In consideration of the covenants herein contained, it is agreed that Carter shall, and does, reserve unto itself an interest in the oil, gas and casinghead gas in and under the premises described above, and to be hereafter produced therefrom as follows:

"From Tracts 1, 2 and 3, Carter shall be entitled to receive, and shall receive, 1/32 of all oil produced and saved from each of said leases by McCasland where the daily average production therefrom is less than 30 barrels per well; 1/16 of all oil produced and saved from each of said leases by McCasland where the daily average production therefrom is from 30 barrels to 75 barrels, inclusive, per well, and 1/8 of all oil produced and saved from each of said leases by McCasland where the daily average production is more than 75 barrels per well.

"From Tract 4, Carter shall be entitled to receive, and shall receive, 1/64 of all oil produced and saved by McCasland where the daily average production therefrom is less than 30 barrels per well; 1/32 of all oil produced and saved by McCasland where the daily average production therefrom is from 30 barrels to 75 barrels, inclusive, per well, and 1/16 of all oil produced and saved by McCasland where

the daily average production is more than 75 barrels per well.

"In determining daily average production hereunder, same shall be calculated upon the basis of each calendar month during which production is being obtained. Carter's interest in the oil produced from said premises shall be delivered to Carter free of expenses, or to Carter's credit in the pipe line which may be connected to, from or upon said premises: Provided, however, Carter may, if it elects, take its proportionate part of the oil so produced and saved in kind, and its option to do so shall extend for the term of this agreement, and may be exercised as often as Carter may desire to exercise it by giving thirty (30) days' notice in writing to McCasland. If at any time Carter is not exercising its option, its part of the oil so produced and saved may be sold by McCasland, together with his part thereof, at not less than the prevailing market price in that locality. Carter shall also have the option of purchasing McCasland's interest in current production of oil produced and saved from said premises at the prevailing market price in that locality, Carter's election in this respect to be exercised by written or telegraphic notice addressed to McCasland at Duncan, Oklahoma, within thirty (30) days after the beginning of the marketing of such production. Should Carter elect to so purchase McCasland's part of the oil produced from said premises, it shall not be obligated to continue the purchase of such production longer than it may elect to do so: Provided, however, before discontinuing the taking of such oil, Carter shall give McCasland thirty (30) days' notice of its intention in this regard.

"Carter reserves unto itself, from Tracts 1, 2 and 3, a 1/8 part, and from Tract 4 a 1/16 part, of all gas and casinghead gas in and under said premises, and that may be produced and saved therefrom, under and in pursuance of the oil and gas leases to be assigned hereunder. Costs and expenses incurred in producing and saving such reserved interest in gas and casinghead gas shall be borne by

McCasland. Carter's right as regards taking its proportionate part of such production in kind, and purchasing McCasland's interest therein shall be the same as above provided in regard to oil production.

"VII.

"It is understood and agreed between the parties hereto, that Carter's undivided ½ interest in the oil and gas lease covering Tract 4 is subject to the terms and conditions of an agreement between Carter and Marland Oil Company dated January 6, 1926, the said Marland Oil Company at that time owning the remaining undivided ½ interest in the oil and gas lease covering Tract 4, which remaining undivided ½ interest is now owned by Continental Oil Company. McCasland assumes, and agrees to be bound by, all of the allegations and conditions imposed upon Carter by the agreement of January 6, 1926, in so far as the interest is concerned which is being assigned by Carter to McCasland in Tract 4 pursuant to the terms of this agreement.

"VIII.

"Should McCasland, after having carried out his drilling obligations above provided, elect to surrender his interest in one of the leases above mentioned, he shall give Carter written notice of his intention so to do in ample time to permit Carter to protect and preserve said leasehold estate, and Carter, after receiving such notice, shall have sixty (60) days to notify McCasland of its election to accept an assignment of his interest therein, and if it so elects, McCasland shall assign his interest therein to Carter. In the event at the time McCasland elects to surrender his interest in the lease, said lease is, or has been, producing oil, gas or casinghead *case,* Carter may go upon said premises or any part or portion thereof, and make and conduct such tests and operations (including shooting, squibbing or clearing out of wells) as it sees fit, and in connection with the conduct of such tests or operations Carter may use, without charge, material and equipment belonging to

McCasland then in or upon said premises, but Carter shall make and conduct such tests and operations at its own risk and expense. During the sixty-day period hereby allowed for making such tests, Carter may, if it desires, elect to accept an assignment of said lease from McCasland, and any of the wells and materials therein and thereon, or may, if it desires, elect to accept an assignment of said lease but to accept only certain of the wells thereon, or none of the wells, and thereupon McCasland shall plug and abandon the wells not accepted, and shall retain title to all material covered, and shall assign to Carter all of his interest in the wells accepted, and shall be paid by Carter the salvage value of the material and equipment necessary to be left in said wells or on said premises for use in the operation of the wells so accepted. If Carter shall not, within the time provided, elect to accept an assignment of said lease, McCasland shall plug and abandon all wells thereon, retaining title to all material and equipment, and may thereupon abandon the lease.

"IX.

"McCasland agrees to preserve and protect the leasehold estates covering the property described above in full compliance with the express and implied terms, conditions and covenants thereof, and to protect and preserve said estates from any and all liens, judgments and any other claims whatsoever. McCasland agrees and guarantees that he will comply with each, every and all of the terms and provisions of this agreement on his part to be kept and performed, and for such compliance he hereby binds himself firmly by these presents. Should McCasland fail to comply with any of the terms and provisions hereof, Carter, in addition to any other relief to which it may be entitled, may demand a re-assignment of the interests transferred as provided for herein, and McCasland shall thereupon and deliver to Carter such instrument, and shall thereafter be entitled to assert no right, title, interest or estate therein. The interest so re-assigned shall be free and clear of all liens, obligations or encumbrances whatsoever.

"X.

"Carter shall, at all reasonable times, have access to the premises covered hereby, through its agents and representatives, to inspect operations thereon, and shall, at all reasonable times, have access to other records of McCasland pertaining thereto, and McCasland, upon request, shall furnish Carter full information in regard thereto.

"XI.

"It is understood that Carter, either alone, or in conjunction with Continental Oil Company, is at this time producing oil and gas from wells heretofore drilled on the lands above described. Carter, or Carter and Continental Oil Company, as the case may be, shall retain full title to said wells, with the right to continue to operate and produce the same from their present producing horizon, and McCasland shall have no interest in or to the material and equipment in said wells or on said premises for the purpose of producing the same, or in any oil, gas or casinghead gas produced by Carter from said wells from their present producing horizon. McCasland, in drilling any wells on the premises to be assigned hereunder, shall do so in such a manner as not to interfere with Carter's and Continental Oil Company's continued operation of said producing wells, or with respect to wells which may hereafter be drilled and operated on said premises, below the depth of four (4,000) thousand feet.

"No well shall be completed by McCasland on any ten-acre tract upon which a producing well is now located, to the same horizon as is being produced in the well on that particular ten-acre tract.

"XII.

"During any and all development and operations hereafter conducted on said premises, McCasland shall abide by all statutes, rules and regulations of Governmental authorities having application to the development and operation of property of the nature here involved. McCasland

expressly agrees to comply with all applicable provisions of the Fair Labor Standards Act of 1938 (Wage and Hour Law), and with all valid regulations having application thereto. McCasland assumes full responsibility for the payment of all contributions and payroll taxes (State and Federal) as to all employees engaged in the performance of work pursuant hereto, and further agrees to meet all requirements that may be specified under regulations of the administrative officials or board charged with the enforcement of any State or Federal Act on the subject referred to, and McCasland agrees to furnish Carter, upon request, a Certificate or other evidence of compliance herewith.

"XIII.

"McCasland shall carry full and adequate Public Liability Employer's Liability and Workmen's Compensation Insurance to protect the parties hereto. Prior to the commencement of operations for the drilling of the test well hereinabove provided for, McCasland shall submit to Carter satisfactory showing evidencing compliance with this provision of the agreement.

"XIV.

"This agreement shall continue for and during the term of the leases to be assigned, as provided for herein, and for the term of any extension or renewal thereof.

"XV.

"No change, modification or alteration of this agreement shall be valid unless the same be made or specified in writing, signed by the parties hereto, and no course of dealing between the parties shall be construed to alter the terms hereof.

"XIV.

"It is further understood that this agreement shall be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns; Provided, however, that any assignment hereunder executed shall specifically

refer to, and be made subject to, the terms and conditions hereof.

"In Witness Whereof, the parties hereto have executed this instrument, in duplicate, the day and year first above written.

"The Carter Oil Company,
By L. F. McCollum,
Vice-President.
O. K. as to transaction RSC
O. K. as to form JLH
First Party.
T. H. McCasland,
Second Party.

Attest: (Seal) O. A. Wise, Assistant Secretary."

(Acknowledgment omitted.)

Appendix B.

"ASSIGNMENT OF OIL AND GAS LEASES.

"Know All Men by These Presents, That The Carter Oil Company, a corporation of the State of West Virginia, for and in consideration of the sum of One ($1.00) Dollar, the receipt of which is hereby acknowledged, and other valuable considerations, does hereby transfer, assign and deliver to T. H. McCasland, subject to the exceptions and reservation hereinafter set forth, all of its right, title and interest in and to those certain leases for oil and gas mining purposes hereinafter described, said leases covering lands situate in Grady County, State of Oklahoma, and shown in the records provided by law for the recording of instruments relating to real property in the office of the County Clerk in and for said County and State, to-wit:

Tract 1: (L-20179) Lease dated November 23rd, 1925, executed by Ellen C. Woods, a widow, as lessor, to Geo. Crow, lessee, recorded in Book 225, at page 204, except as modified by stipulation dated February 27th, 1931, executed by Ellen C. Woods, First Party, and The Carter Oil Company, Second Party, recorded in Book 313, at page 391, in so far as it covers the Northwest Quarter of the Northeast Quarter of the Southwest Quarter (NW4 of NE4 of SW4) of Section Eight (8), Township Three (3) North, Range Five (5) West.

Tract 2. (L-20126) Lease dated April 15, 1922, executed by H. J. Horton, as Guardian of the Estate of Burruss Andrew Horton, a Minor, as lessor, to K. C. B. Development Company, lessee, recorded in Book 183, at page 560, in so far as said lease covers the Southeast Quarter of Southeast Quarter (SE4 of SE4) of Section Eight (8) and the North Half of North Half of Northeast Quarter (N2 of N2 of NE4) and Northeast Quar-

ter of Northeast Quarter of Northwest Quarter (NE4 of NE4 of NW4) of Section Seventeen (17), Township Three (3) North, Range Five (5) West.

Tract 3: (L-18985) Lease dated November 23, 1922, executed by W. E. Woods and Minnie Woods, his wife, as lessor, to Alcorn Oil Company, lessee, recorded in Book 200, at page 270, and in so far as said lease covers the South Half of North Half of Northeast Quarter (S2 of N2 of NE4) of Section Seventeen (17), Township Three (3) North, Range Five (5) West.

Tract 4: (L-20126) Lease dated April 15, 1922, executed by H. J. Horton, as Guardian of the Estate of Buruss Andrew Horton, a Minor, as lessor, to K. C. B. Development Company, lessee, recorded in Book 183, at page 560, in so far as said lease covers an undivided one-half (½) interest in and to the West Half of Southeast Quarter (W2 of SE4) and the East Half of East Half of Southwest Quarter (E2 of E2 of SW4) of Section Eight (8), Township Three (3) North, Range Five (5) West.

Insofar as said leases cover producing horizons above the depth of 4,000 feet.

"Assignor expressly retains, saves and reserves from the operation of the within assignment and unto itself, its successors and assigns, an interest in and to the oil in place in and under Tracts 1, 2 and 3, above, and to be hereafter produced therefrom free of cost and expenses to assignor, as follows: 1/32 where the daily average production therefrom is less than 30 barrels per well; 1/16 where the daily average production therefrom is from 30 barrels to 75 barrels, inclusive, per well, and 1/8 where the daily average production is more than 75 barrels per well. Assignor expressly retains, saves and reserves from the operation of the within assignment and unto itself, its successors and assigns, an undivided 1/8 part of all gas and casinghead gas in place in and under Tracts 1, 2 and 3, above, and to be

hereafter produced therefrom, free of cost and expense to assignor.

"Assignor further expressly retains, saves and reserves from the operations of the within assignment and unto itself, its successors and assigns, an interest in and to the oil in place in and under Tract 4, above, and to be hereafter produced therefrom, free of cost and expense to assignor, as follows: 1/64 where the daily average production therefrom is less than 30 barrels per well; 1/32 where the daily average production therefrom is from 30 barrels to 75 barrels, inclusive, per well, and 1/16 where the daily average production is more than 75 barrels per well. Assignor expressly retains, saves and reserves from the operation of the within assignment and unto itself, its successors and assigns, an undivided 1/16 part of all gas and casinghead gas in place in and under Tract 4, above, and to be hereafter produced therefrom, free of cost and expense to assignor.

"Assignor further expressly retains, saves and reserves from the operation of the within Assignment and unto itself, its successors and assigns, all right, title and interest in and to Tracts 1, 2, 3 and 4, above, in so far as they cover producing horizons below the depth of 4,000 feet, together with the right of ingress and egress for the purpose of exploring for and producing oil, gas and casinghead gas therefrom.

"By this assignment it is understood that the assignor quit claims to the assignee, subject to the exceptions and reservations hereinabove set forth, all of its right, title and interest in and to the above described leases, without express or implied warranty of title.

"This Assignment is further subject, however, to all rights and interests reserved by and to all of the terms, covenants and provisions contained in a certain Agreement entered into under date of January 31st, 1939, by and between the parties hereto pertaining to the aforesaid leases and the development thereof.

"Witness the Carter Oil Company by the hand of its Vice-President, and the seal of said corporation duly attested by its Assistant Secretary, this 8th day of May, 1939.

"The Carter Oil Company,
By L. F. McCollum,
Vice-President.

O. K. as to transaction
C. M. C. B.

O. K. as to form H. C. C.

Attest: (Seal) O. A. Wise, Assistant Secretary."

(Acknowledgment omitted.)

FILED
OCT 24 195
CHARLES ELMORE CR

In The
Supreme Court of the United States

OCTOBER TERM, 1951

No. 338

THE CARTER OIL COMPANY,
Petitioner,
VERSUS

T. H. MCCASLAND, N. W. BRILLHART, GLENN NORVILLE, CHARLES R. RIDER, THOMAS H. MCCASLAND, JR., TRUST; MARY FRANCES MCCASLAND, TRUST; JOHN FLACK BURTON, TRUST; and JAMES LESLIE BURTON, TRUST,
Respondents.

BRIEF OF RESPONDENTS

C. D. CUND,
P. O. Box 310,
Duncan, Oklahoma;

CLARENCE MCELROY,
Oklahoma National Bank Building,
Chickasha, Oklahoma,
Counsel for Respondents.

OWEN VAUGHN,
Oklahoma National Bank Building,
Chickasha, Oklahoma;

R. H. BROWN,
906½ Main Street,
Duncan, Oklahoma,
Of Counsel.

OCTOBER, 1951.

KING LAW BRIEF CO., 222 N.W. THIRD, OKLAHOMA CITY — PHONE 3-2969

INDEX

	PAGE
Statement	1
Argument	3
Carter's Question No. 1	3
Authority:—	
Carter's Question No. 2	10
Continental Supply Co. v. Marshall, 152 F. 2d 300	9
Corbin v. Wilkinson, 175 Okl. 247, 52 P. 2d 45	7
Frances et al. v. Superior Oil Co., 102 F. 2d 732	9
House Bill No. 339, 1945 Oklahoma Legislature, 52 O.S. Supp. 1945, Sections 286.1 to 286.17	3
Kolachny v. Galbreath, 26 Okl. 772, 110 P. 902	8
Livingston v. Indian Territory Illuminating Oil Co., 91 F. 2d 833	9
Melton et al. v. Snead et al., 188 Okl. 388, 109 P. 509	9
Ohio Oil Co. v. Sharp, 135 F. 2d 303	9
Palmer Oil Corp. v. Phillips Petroleum Co. (Okl.), 231 P. 2d 997	3
Rich v. Doneghy, 71 Okl. 204, 177 P. 86	8
United States v. Stanolind Crude Oil Purchasing Co., 113 F. 2d 194	8, 9
12 O.S.A. 977	6
16 Am. Jur. 602	9
Authority:—	
Carter's Question No. 3	12

PAGE

Carter's Question No. 4 19

Wilcox Oil & Gas Co. v. Bond, 174 Okl. 348, 48 P. 2d 820 11

Authority:—

Bourdieu v. Pacific Western Oil Co., 299 U.S. 65, 81 L. ed. 42 29

Calcote v. Texas Pacific Coal & Oil Co., 157 F. 2d 216 ..... 23, 25

Kentucky Natural Gas Corp. v. Duggins et al., 165 F. 2d 1011 ..... 23, 25

Mechanics' Bank of Alexandria v. Seaton, 1 Peters 299, 7 L. ed. 152 27

Rule 19 (a), Federal Rules of Procedure 20

Rule 12 (b), Federal Rules of Procedure 20

Rule 12 (d), Federal Rules of Procedure 21

Rule 12 (h), Federal Rules of Procedure 21

Salem Trust Co. v. Manufacturers Finance Co. et al., 264 U.S. 182, 68 L. ed. 629 29

State of Washington v. United States, 87 F. 2d 421 ..... 22, 24, 25

Shields v. Barrow, 17 How. 130, 15 L. ed. 158 ..... 23, 24

Utility Production Corp. v. Riddle et al., 161 Okl. 99, 16 P. 2d 1092 ..... 23, 25

Conclusion 30

Appendix

In The
Supreme Court of the United States
OCTOBER TERM, 1951

No. 338

THE CARTER OIL COMPANY,
Petitioner,
VERSUS
T. H. McCASLAND, N. W. BRILLHART, GLENN NORVILLE, CHARLES R. RIDER, THOMAS H. McCASLAND, JR., TRUST; MARY FRANCES McCASLAND, TRUST; JOHN FLACK BURTON, TRUST; and JAMES LESLIE BURTON, TRUST,
Respondents.

BRIEF OF RESPONDENTS

In this response we shall refer to petitioner as "Carter" and to respondents as "McCasland".

STATEMENT

Carter's statement of the case, insofar as it goes is essentially correct.

Attached to this response as Appendix A is a history of the development of the two leases involved in this action for oil and gas mining purposes.

All the wells drilled on these two leases produce oil from a formation known as the Woods Sand Zone. The Woods Sand Zone is a producing horizon extending in a northwest-southeast direction for a distance of about 3½ miles (R. 79). It has a width of 1000 to 1200 feet (R. 79), and a thickness of from 50 feet (R. 90) to 109 feet (R. 91). The Woods Sand Zone is a reservoir constituting a common source of supply of oil (R. 73, 75, 76, 96, 116, 117, 120, 183). (Trial court's Findings XVI, R. 36.)

It is alleged in the complaint filed by McCasland in the trial court that all wells drilled by McCasland encountered and completely penetrated the Woods Sand formation above the depth of 4000 feet from the surface of the ground (R. 5); that the Woods Sand formation constitutes a common source of supply of oil and that the oil in that part of the Woods Sand formation lying more than 4000 feet below the surface of the ground and the oil in that part of the same formation lying at a depth less than 4000 feet from the surface of the ground commingles and is contained in the same common source of supply or reservoir, and that there is a free movement of oil throughout such reservoir and that McCasland can produce, without economic loss or waste, all the oil contained in such common source of supply by drilling wells

to a depth of not more than 4000 feet from the surface of the ground (R. 5).

The facts as alleged in McCasland's complaint in the lower court were established by evidence and found by the court to exist (R. 73, 74, 75, 96, 104, 105, 116, 117, 120, 183). (Trial court's Findings XVI, R. 36.)

ARGUMENT

Carter presents its Petition on four questions and assigns as reason for granting the writ its answer to the four questions propounded.

Carter's Question No. 1

Carter first argues that the decision of the Court of Appeals for the Tenth Circuit is in conflict with a five to four decision of the Supreme Court of Oklahoma in *Palmer Oil Corp.* v. *Phillips Petroleum Co.* (Okl.), 231 P. 2d 997.

The *Palmer case* involved the constitutionality of the unitization statute of the State of Oklahoma (House Bill 339, 1945 Okla. Legislature, 52 O.S. Supp. 1945, Sec. 286.1 to Sec. 286.17).

The Corporation Commission of the State of Oklahoma, pursuant to the applicable provisions of said statute, provided for the unitized management, operation and future development of what it had designated as "West Cement Medrano Unit" located in Caddo County, Oklahoma. Phillips Petroleum Company had been named as

the company to manage, operate and further develop the unitized unit.

Apparently, there was contained within the "West Cement Medrano Unit" the Southwest Quarter of Section 35, Township 6 North, Range 10 West, upon which the Gulf Oil Corporation had at one time owned a valid, subsisting oil and gas mining lease. In 1938, Gulf assigned to Palmer Oil Corporation "all of its right, title and interest in said lease to a depth of 6000 feet, retaining the lease as to the oil, gas and casinghead gas, together with all the rights, privileges and appurtenances thereunto belonging, below the depth of 6000 feet."

Palmer drilled a well to but not beyond said 6000-foot level and obtained production from the Medrano Sand therein prior to the unitization of the field but while proceedings were pending for the unitization of the field. Gulf had no well producing from the sand below the 6000-foot level and was not authorized under the untization plan to drill and produce therefrom. The Corporation Commission divided the percentage of the authorized lease production between the Gulf and Palmer.

The language contained in the assignment of the lease from Gulf to Palmer is materially different to that used in the assignment and contract involved in this action. The Gulf assigned to Palmer its entire interest in said lease to a depth of 6000 feet, which was the extent of the interest acquired by Palmer. In the instant case,

Carter assigned to McCasland the leases involved in this case not to a depth of 4000 feet, but "insofar as said leases cover producing horizons above the depth of 4000 feet." The Gulf assignment to Palmer did not contain the words "producing horizons" but was an assignment of a lease to a specified 6000-foot depth while the assignment in the instant case was not an assignment of leases to any particular designated depth measured by feet, but was an assignment of an interest measured in depth, not by feet but by "producing horizons."

Notwithstanding any statement that may be contained in the Supreme Court opinion in the *Palmer case*, the Corporation Commission construed no contracts for the purpose of making a division of allowable production between Gulf and Palmer. If such a division were made, it was by reason of a section of the Unitization Act authorizing such division. The Corporation Commission does not have the power, and we have never heard of the contention being made that it does have the power, to determine the rights of property as between individual claimants thereto.

There may be some doubt as to the law of the *Palmer case*. Carter, in its Brief for the writ and on Page 10 thereof, states:

> "Since the correctness of the decision in the *Palmer case* is challenged in this court only upon the constitutionality of the Unitization Act, it follows that notwithstanding the case may be reversed on that ground, the decision of the Oklahoma Supreme Court

> as to the interpretation of the Palmer farmout contract will not be erased but will stand as a pronouncement of the Oklahoma Supreme Court as to the true and proper interpretation of such contracts and will be indicative of the court's holding in any future case which may be brought before it involving such interpretation."

We state that this is not the law of the *Palmer case* as announced by the Supreme Court. That case did not involve the construction or interpretation of a contract between any parties to the action. Involved in the *Palmer case* were two major questions. One, the constitutionality of said sections of the statute which as a whole constitute what is known as the Unitization Act, HB 339 of the 1945 Oklahoma Legislature. The other, the legality of the order of the Commission if authorized under the Act to effect unitization. The court's opinion was not handed down until after the 1951 Legislature had completely done away with the Act considered by the court and in lieu of that Act, had enacted an entirely new and complete untization Act, eliminating by the new Act many of the objectionable features of the old Act.

12 O.S.A. 977 provides:

> "A syllabus of the points of law decided in any case in the Supreme Court shall be stated, in writing, by the Justice delivering the opinion of the court, and filed with the papers of the case, which shall be confined to points of law arising from the facts in the case, that have been determined by the court; and the syllabus shall be submitted to the Justices concurring therein, for revisal before filing thereof, and it shall be filed with the papers, without alteration,

> unless by consent of the justices concurring therein; and a copy of such syllabus shall, in all cases be sent to the court below, by the clerk of the Supreme Court, with the mandate provided for by Section 5258 (R.L. 1910, § 5260)."

Nowhere in the syllabus prepared by the court was reference made to the controversy between Gulf and Palmer. Our statute has been construed in the case of *Corbin* v. *Wilkinson*, 175 Okl. 247, 52 P. 2d 45, wherein the court said:

> "Under our statutes, the law of a case is stated in the syllabus. The syllabus does not contain the expression (referring to an expression of law relied upon by the plaintiff) and therefore this court did not intend to declare the law as stated in the expression."

There has never been any effort made by the Corporation Commission to unitize the oil field involved in this action as it did the West Cement Medrano field. This is neither a proration nor a unitization case and the *Palmer case* throws no light on the problem confronting us in this case.

A "producing horizon" was defined by the trial court (Findings of Fact XV, R. 36). The Court of Appeals defined a "producing horizon" as "The point at which a pool, reservoir or common source of supply of oil or gas is encountered and from which the oil therein may be extracted."

Carter states that it granted to McCasland the leases involved in this action as to producing horizons above

the depth of 4000 feet and retained in identical language the leases as to producing horizons below the depth of 4000 feet with the right of ingress and egress to produce oil. If Carter granted and assigned to McCasland the leases insofar as they cover producing horizons above the depth of 4000 feet, as all parties to this action now agree was done, and a producing horizon is such as that defined by the trial court and the Court of Appeals for the Tenth Circuit, then the assignment from Carter to McCasland vested in McCasland the exclusive right to drill wells to a depth not greater than 4000 feet from the surface of the ground and to produce from such wells so drilled all producible oil contained in the Woods Sand Zone formation or producing horizon, drilled through and completely penetrated by the McCasland wells above the depth of 4000 feet, although such formation may have extended below such depth and McCasland had this right under said assignments free of any right on the part of Carter to interfere therewith or to invade or violate such right by withdrawing oil from such reservoir through wells drilled by it below the depth of 4000 feet.

It is a well established principle of law that oil and gas in place in Oklahoma is not subject to ownership.

United States v. *Stanolind Crude Oil Purchasing Co.*, 113 F. 2d 194;
Kolachny v. *Galbreath*, 26 Okl. 772, 110 P. 902;
Rich v. *Doneghy*, 71 Okl. 204, 177 P. 86.

An oil and gas mining lease or an assignment of an oil and gas mining lease gives to the lessee or assignee the exclusive right to drill for, develop, produce and reduce to possession the oil and gas underlying the leased premises. The word "exclusive" carries with it the idea that if it is exclusive, no one, and this includes the assignor, has the right to interfere with the assignee's right or to do anything that would preclude the assignee from the full, exclusive enjoyment of the right conferred.

Livingston v. *Indian Territory Illuminating Oil Co.*, 91 F. 2d 833;
Frances et al. v. *Superior Oil Co.*, 102 F. 2d 732;
United States v. *Stanolind Crude Oil Purchasing Co.*, 113 F. 2d 194;
Ohio Oil Co. v. *Sharp*, **135 F. 2d 303;**
Continental Supply Co. v. *Marshall*, 152 F. 2d 300.

It is a settled principle of law that in the absence of any language in a deed indicating a contrary intention on the part of the grantor, everything that is properly appurtenant to the land granted thereby—that is everything that is essential or reasonably necessary to the full beneficial use and enjoyment of the property and which the grantor has the power to convey—is to be considered as passing to the grantee.

16 Am. Jur. 602;
Melton et al. v. *Snead et al.*, 188 Okl. 388, 109 P. 509.

When the Carter Oil Company granted to McCasland the exclusive right to drill to and produce oil from all producing horizons above the depth of 4000 feet, that grant carried with it everything essential or reasonably necessary to McCasland's full beneficial use and enjoyment of the exclusive right to produce oil from producing horizons encountered above the depth of 4000 feet. Can he have such full beneficial use and the exclusive enjoyment of the property as to all producing horizons above 4000 feet when the Carter Oil Company comes within 75 feet of one of his wells and produces from wells drilled deeper than 4000 feet oil contained in the same producing horizon above 4000 feet, or can he have the full beneficial use and enjoyment of the property as to all producing horizons above 4000 feet when the Carter Oil Company, over his protest and objection, whipstocked or directionally drilled a well more than 200 feet towards his well in order to take oil from a producing horizon that he had completely penetrated above the depth of 4000 feet?

Carter's Question No. 2

Question No. 2 presented by Carter is:

"Whether this Court should grant certiorari because the court below departed from the established laws of the State of Oklahoma in that it refused to apply the rule of capture in arriving at the rights of the parties under the contract and assignment herein involved which have to do with oil and gas rights."

The discussion of this question commences on Page 10 of the Petition and extends through Page 12 and a part of Page 13.

The court below did not refuse to recognize the rule of capture. The rule of capture is not involved in the case at Bar. It is conceded by all parties generally that the rule of capture does obtain in Oklahoma; that it is subject to be modified by the State in the exercise of its police power.

Wilcox Oil and Gas Co. v. *Bond*,
173 Okl. 348, 48 P. 2d 820,

and other cases cited by petitioner in its Brief.

As stated, the court below did not refuse to recognize this rule. The court simply held that Carter had assigned to McCasland the exclusive right to develop the leases, drill wells thereon and produce oil from producing horizons above the depth of 4000 feet; that this was an exclusive right granted to McCasland and that after the grant of such exclusive right, he was entitled to produce and capture all the oil capable of being produced and captured from any horizon encountered by McCasland in wells drilled to a depth not greater than 4000 feet from the surface of the ground without interference or interruption by Carter Oil Company, and that the drilling of wells by Carter Oil Company into the same producing reservoir encountered and completely penetrated by McCasland above 4000 feet and producing oil therefrom was

an unjustified invasion of the rights granted to McCasland.

Carter's Question No. 3

In Carter's Brief, beginning at Page 13 down to the first numbered paragraph on Page 17, Carter complains of certain language used by the writer of the opinion in the Circuit Court. Justice Huxman, Circuit Judge, in the introductory sentence of the opinion of the court in stating the gist of the lawsuit used this language:

> "This was an action for a declaratory judgment, in which appellees sought a declaration of rights between them and appellants under a contract and an assignment, assigning to appellees certain rights in and to oil and gas producing horizons encountered at a depth of less than 4000 feet" (R. 289).

Later in the opinion Justice Huxman used this language:

> "While numerous assignments of error are urged, the crux of the controversy is whether Carter, having assigned the right to drill for and produce oil and gas from a producing horizon, encountered above 4000 feet, * * *" (R. 292).

Carter in criticizing these statements of the writer of the opinion below, finds fault with the word "encountered." This, we submit, is nothing more nor less than a play on words on the part of counsel for Carter. McCasland in his Petition alleged that in the development of the property for oil and gas and in the drilling of wells thereon, he encountered above the depth of 4000 feet a formation productive of oil in paying quantities known

as the Woods Sand formation; that in certain areas the entire Woods Sand formation can be penetrated above the depth of 4000 feet from the surface of the ground (R. 4), and further alleged that in the wells drilled by the plaintiffs such common source of supply is encountered at a depth of less than 4000 feet from the surface of the ground and can be penetrated before the well reached a depth of 4000 feet below the surface of the ground (R. 5). The plaintiffs further alleged that since such formation can be encountered at a depth of less than 4000 feet below the surface of the ground under such contract and assignment, they are entitled to all the oil produced or producible from said common source of supply and the defendant is not entitled to produce any oil from such common source of supply (R. 6).

The plaintiffs or complainants not only made such allegations but established by the evidence that the Woods Sand Zone producing horizon was encountered at a depth less than 4000 feet from the surface of the ground, and that the Woods Sand producing horizon was completely penetrated in the bore holes of the wells above the depth of 4000 feet from the surface of the ground (R. 68, 69, 70), and we submit that the writer of the opinion in the court below in the introductory paragraph certainly was justified in using the word "encountered" in all instances. Carter contends that the word "encountered" is read into the contract and assignment. The assignment and con-

tract refer numerous times to producing horizons. The contract at Page 8 of the Record states:

> "* * * and insofar as they cover producing horizons above the depth of 4000 feet, * * *",

and the assignment (R. 17) contains this language:

> "Insofar as said leases cover producing horizons above the depth of 4000 feet."

We submit that in order for a producing horizon to be above the depth of 4000 feet that there must be an horizon that is encountered at a depth of less than 4000 feet from the surface of the ground, and to argue that the contract and the assignment say nothing about horizons encountered above 4000 feet is only to waste time.

Under the contract and assignment involved in the case at Bar, Carter, for a valuable consideration, sold and conveyed to McCasland all of its exclusive right to drill for and capture oil or gas found in any producing horizon above the depth of 4000 feet, and in order for McCasland to obtain anything by reason of such contract and assignment, he had to encounter a producing horizon above the depth of 4000 feet, and, under the record in this case, he not only encountered such horizon but completely penetrated the same above a depth of 4000 feet thereby conclusively establishing the fact that the Woods Sand was a producing horizon above the depth of 4000 feet, and that Carter had sold to McCasland the right to reduce to possession all of the oil that he could produce from such horizon.

The Record fully substantiates the fact that McCasland, by reason of the wells drilled by him in which he encountered the Woods Sand Zone producing horizon above the depth of 4000 feet, can produce all of the producible oil from such producing horizon by normal operating methods, and that this being true, McCasland is entitled to take all of such oil without interference on the part of Carter, Carter having parted with all of its rights to capture any of the producible oil in the Woods Sand Zone formation.

We invite the Court's attention to both the contract and the assignment in their entirety. The contract is found in the Record at Pages 7 to 16, and the assignment is found at Pages 16 to 19. A reading of these instruments will disclose that the term "producing horizon" and the term "producing horizons" appear numerous times, and such instruments disclose that the parties were contracting with reference to producing horizons, and that they were not dealing in leases that were to be horizontally divided at a depth of 4000 feet from the surface of the ground. Both the trial court and the Court of Appeals found that the parties to the contract and the assignment did not intend that both the Carter, as assignor, and McCasland, as assignee, should produce oil from the same producing horizon, and, notwithstanding this fact, counsel for Carter in their Brief at Page 16, state that this construction of both of the lower courts could not be

based upon any testimony going to Carter's intention because all of the competent testimony on that score was to the effect that Carter did so intend. Without burdening the Court with all of the testimony on this question, we desire to set out in part a portion of such testimony. MR. FLOYD testified as follows (R. 230):

Q. "During the inception and consummation of various farm out agreements with which you had anything to do was it your intention or, so far as you know, the intention of the Carter Oil Company that at any time two wells would be drilled upon any particular geographical ten-acre tract into and produce from the same common source of supply?

A. No, sir."

He further testified (R. 230-231):

Q. "Assuming that in the drilling of a well the Carter should encounter above 4000 feet from the surface of the ground a formation now known as the Woods Sand Zone formation, and such formation at the well base extended below 4000 feet, was it your thought or intention or, so far as you know, was it the thought or intention of the Carter Oil Company or McCasland, that under such circumstances the Carter would set its pipe in the producing formation at 4001 feet leaving part of the sand behind the pipe and produce the same from that formation?

A. Well, of course, that particular situation never occurred to me and I don't think it did to any of the others. But I certainly wouldn't contemplate that I would recommend doing a thing like that."

On cross-examination, MR. FLOYD further testified (R. 232):

Q. "Counsel has asked about drilling on these ten-acre location tracts. If the Carter Oil Company, under your supervision, had drilled on some of these leases on a ten-acre tract where Mr. McCasland had not yet drilled and had it encountered this Woods Sand formation above the 4000 feet, you would have drilled on in below the 4000-foot depth before you produced it, would you not?

A. Probably so.

Q. Under those circumstances, you would have thought you had the right to produce under the 4000 feet under your contract with McCasland, would you not?

A. Yes. If I had drilled the well first I would. I would have felt like I would have worked out some deal with him. I don't know just what."

At this point we would like to state in view of the last answer given by Mr. Floyd, that the Carter Oil Company did not drill the first well on any lease involved in this case.

T. H. McCASLAND, the other party to the transaction out of which came the contract and the assignment in the case at Bar, testified as follows (R. 147):

A. "Well, we understood that I had that area in which to operate and that I should have the benefit of anything I should discover and produce above that depth."

MR. McCASLAND was asked this question (R. 153):

Q. "And you understood the Carter was retaining everything below 4000 feet?

A. I understood I had on this one except that I couldn't produce on any ten acres where the

Carter had a well in the same zone I couldn't produce that, but I had the rest to do my exploring."

He was further asked (R. 156):

Q. "Later when they wanted to whipstock to the east you objected to that?

A. Yes, sir.

Q. For what reason?

A. Well, I figured they would get over and get some of our oil which they were not entitled to.

Q. Mr. McCasland, on the B. A. Horton '8', is it your contention that the Carter had no right to drill that?

A. Oh no, I think they have got a right to drill anywhere they want to, but it is my contention they didn't have a right to take oil from this Woods Zone.

Q. Regardless of where they penetrated it?

A. They didn't in case I could recover that oil.

Q. It is your interpretation then, what you are trying to say they would have to wait until you produce all you can above 4000 feet and if there is any left they can produce it. Is that your understanding of that contract?

A. Of course, the contract is in evidence. If I can get the oil I am entitled to all I can get.

Q. Well now, when the contract provides they were to operate the wells they had and drill other wells below 4000 feet?

A. It was never contemplated by anybody that we should both would operate from the same source of supply. I am certain of that.

Q. If the source of supply was part above and part below why didn't you insist on getting hori-

zons, production areas or horizons, or whatever you call it, included down to 4000 feet if that was your interpretation?

A. At the time these contracts were made from what we knew about the country the dips were not steep. They were relatively flat. The most you can figure in any kind of a location would be 20 to 30 feet probably of dip. Nobody contemplated or thought of that. If we had naturally we wouldn't be deadlocked. It was never contemplated we both would go on the same ten and get the same source of supply. That was sure."

It is interesting to note that the contract and assignment involved in the instant action followed a pattern set by a contract and an assignment negotiated by F. W. Floyd for the Carter Oil Company and T. H. McCasland. This contract that was negotiated between Floyd for Carter and McCasland was entered into sometime prior to the contract and assignment involved in the instant action. At the time the first contract was negotiated, Mr. Floyd was Vice-President of the Carter Oil Company. At the time he testified by deposition, as above set out, he was no longer employed by the Carter Oil Company but was employed by Phillips Oil Company.

Carter's Question No. 4

In its fourth proposition or question, Carter contends that the court was without jurisdiction to decide this case because persons referred to by Carter as owners of minerals under the leased premises were not made par-

ties to the action and that they were indispensable parties to a determination of the action.

It is the contention of McCasland that Carter cannot now raise this question. The opinion of the Court of Appeals of the Tenth Circuit was filed July 10, 1951 (R. 289). The question argued by Carter in its fourth question was not raised by it or presented to any court until it filed its Petition for Rehearing before the Court of Appeals for the Tenth Circuit. This Petition for Rehearing was filed in the Court of Appeals August 9, 1951 (R. 305).

Rule 19 (a) of the Federal Rules of Procedure provides:

> "(a) NECESSARY JOINDER. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant, or, in proper cases, an involuntary plaintiff."

Rule 12 (b) of the Federal Rules of Civil Procedure provides, among other things:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. * * *"

Rule 12 (d) provides:

"(d) PRELIMINARY HEARINGS. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, * * * shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial."

Rule 12 (h) provides:

"(h) WAIVER OF DEFENSES. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, * * * may also be made by a later pleading, if one is permitted, * * * and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. * * *"

No one has ever made the contention at any stage of the proceedings in this case that the court does not have jurisdiction of the subject matter of this case. The subject matter of this case is a contract and assignment of an oil and gas mining lease or leases covering real property within the jurisdiction of the United States District Court for the Eastern District of the State of Oklahoma. The parties to the action were Carter Oil Company, a foreign corporation, and certain plaintiffs, residents of Oklahoma and Texas. There is a complete diversity of citizenship between the plaintiffs and the defendants. It was alleged

and the court found as a fact, that the jurisdictional amount was involved.

It does not appear in any of the pleadings, either the complaint of the plaintiffs, any motion filed by the defendant or the Answer of the defendant, that there is a lack of parties, whether indispensable or otherwise.

Error in the non-joinder of necessary or indispensable parties is not a jurisdictional defect.

State of Washington v. *United States,* 87 F. 2d 421.

If there is error in the non-joinder of necessary or indispensable parties and that error is jurisdictional, which we do not concede it to be under the last case hereinabove cited, then, if the error is obvious, it might properly be noticed by the court of its own motion, but if not obvious, and in the case at Bar no such error is obvious, such jurisdictional requirement may be waived if objection is not presented by defendant primarily or at the beginning or prior to the trial.

If this Court should hold, which we do not believe it should, that this question can be raised at this late date after the petitioner has gambled on the outcome of the case in the Court of Appeals without raising the issue, then we desire to make the following further argument in response to Carter's Question No. 4.

The record discloses that this is an action seeking a declaratory judgment, asking the Court to determine the

rights of Carter and McCasland under a certain contract and assignment, and that the only parties to the contract and assignment involved in this case are Carter and McCasland.

So far as the record in this case discloses, all royalty owners or owners of a mineral interest under the property have been paid all royalty due by reason of production being had from the property and none of the mineral interest owners have an interest in the subject matter of this action which is joint with the interest of either Carter or McCasland.

So far as the Record in this case discloses, the mineral rights under this property are owned by persons from the top to the bottom, there being no difference in the owners of the mineral rights above 4000 feet and the mineral owners below 4000 feet. If this be true, and it is, the mineral owners under this property will be entitled to and will receive their proportionate part of the oil reserved by the leases as a royalty regardless of whether that oil may be produced by the Carter Oil Company or McCasland, or both.

Carter cites in support of its fourth proposition:

Shields v. *Barrow*, 17 How. 130, 15 L. ed. 158;
Utility Production Corp. v. *Riddle et al.*, 161 Okl. 99, 16 P. 2d 1092;
Calcote v. *Texas Pacific Coal & Oil Co.*, 157 F. 2d 216;
Kentucky Natural Gas Corporation v. *Duggins et al.*, 165 F. 2d 1011;

State of Washington v. *United States*, 87 F. 2d 421.

The *Shields-Barrow case* involved the cancellation of a contract. The contract had been signed by Barrow as first party thereto, and by Shields and four or five other parties as second parties. The Barrow suit was commenced against Shields and one of the other signers of the contract. Four of the signers of the contract were not made parties to the suit. The court held that the four persons who signed the contract but were not joined as parties in the suit were indispensable parties. Mr. Justice Curtis wrote the opinion of the court. The case holds, among other things:

> "Those whose interests are separable from those before the court are not indispensable parties.
>
> "On bill to rescind a contract all those substantially interested in the contract should be parties unless the interests are separable.
>
> "If the case can be completely decided as between the parties, the fact that an interest exists in another whom the court cannot reach by process, will not prevent a decree."

In the instant case, the mineral owners are not parties to the contract between Carter and McCasland and a decree may be entered affording complete relief to the parties before this Court without affecting the interests of the mineral owners. If a controversy should arise between the mineral owners and Carter or between the mineral owners and McCasland, it would involve matters that are not involved in this litigation, those matters would

be entirely separate and apart from the matters involved in this litigation and would present questions to the Court that are not presented by the instant case.

The cases of *Calcote* v. *Texas Pacific Coal & Oil Co.*, *Utility Production Corp.* v. *Riddle*, and *Kentucky Natural Gas Corp.* v. *Duggins, supra*, cited by Carter, are all cases involving the cancellation of oil and gas mining leases as distinguished from the case at Bar. An oil and gas mining lease is an entire and indivisible contract and so far as we know, the courts have uniformly held that before an action may be maintained to cancel such a lease, all persons interested in the mineral rights under the property covered by the lease should either join as plaintiffs in the suit for cancellation or be made parties defendant because the right of any one tenant is not distinct and the relief sought is interwoven with the rights of the other tenants. The instant case is not a cancellation suit.

The case of *State of Washington* v. *United States, supra*, cited and relied upon by Carter, was an action commenced by the United States to recover possession and quiet its title to a tract of land. The suit was commenced as against the lessees of the State of Washington. The State of Washington was in possession of the property through its lessees and asked permission to intervene in the refused to permit the State to intervene and the State appealed. The court held that since the object of the suit was to recover possession of and quiet the title to a tract

of land claimed to be owned by the State of Washington, that the State of Washington was an indispensable party thereto and should have been permitted to intervene in the action.

There are four classes of parties to actions in Federal courts, namely:

(1) formal or normal,

(2) proper,

(3) necessary or, more accurately speaking, conditionally necessary, and

(4) indispensable.

Under no decisions that we have been able to find and under the facts as they exist in the instant case, are the mineral owners under this property indispensable parties to this suit. Most of the owners of the mineral rights under the leased premises, as shown by the record in this case, are residents of the State of Oklahoma and to hold that they are indispensable parties would destroy the diversity of citizenship necessary to give the Federal court jurisdiction to hear and determine this case.

The principles applicable to a determination of whether a party is merely proper or whether he is one that should be joined because he is a necessary or indispensable party are comparatively simple. They revolve about the question of interest in the controversy. There is no prescribed formula for determining in every case whether a person or corporation is an indispensable party.

As stated to this Court, the owners of the mineral rights under this property were neither necessary nor indispensable parties to this controversy between Carter and McCasland. McCasland was simply asking the court to declare his rights under a certain contract and assignment. The mineral owners were not parties to either the contract or assignment and in no sense were they concerned with a declaration of the rights as between Carter and McCasland. What relief could McCasland have asked against the owners of the mineral rights under this property had he made them parties to the suit? He was seeking no relief against them. He could state no cause of action against them. Had he made them parties to the lawsuit, he could not have stated a cause of action and his Petition would have been subject to being dismissed by the mineral owners for a failure to state a cause of action. The mineral interest owners have violated none of McCasland's rights and they have no connection whatever with the controversy between McCasland and Carter, which controversy deals solely with the construction of a contract and an assignment.

The case of *Mechanics' Bank of Alexandria, appellant* v. *Louisa and Anna Maria Seton, appellees*, 1 Peters 299, 7 L. ed. 152, held:

> "2d. The second objection, that Adam Lynn ought to have been made a defendant, would seem to grow out of a misapprehension of the object of this bill and the specific relief sought by it.
>
> "It ought to be observed here, preliminarily, as matter of practice, that although an objection for want of proper patries may be taken at the hearing; yet the objection ought not to prevail upon the final

hearing on appeal; except in very strong cases, and when the court perceives that a necessary and indispensable party is wanting.

"The objection should be taken at any earlier stage in the proceedings, by which great delay and expense would be avoided.

"The general rule, as to parties, undoubtedly is, that when a bill is brought for relief, all persons materially interested in the subject of the suit, ought to be made parties, either as plaintiffs or defendants in order to prevent a multiplicity of suits, and that there may be a complete and final decree between all parties interested. But, this is a rule established for the convenient administration of justice, and is subject to many exceptions; and is, more or less, a matter of discretion in the court; and ought to be restricted to parties whose interest is involved in the issue, and to be affected by the decree. The relief granted, will always be so modified as not to affect the interests of others. 2 Mad. Chancery, 180; 1 Johns. Chancery Cases, 350.

"Where was the necessity, or even propriety, of making Lynn a party? No relief is sought against him. The bill expressly alleges that he was perfectly willing to make the transfer; but permission was refused by the bank. There is no allegation in the bill upon which a decree could be made against Lynn; and it is a well settled rule, that no one need be made a party, against whom, if brought to a hearing, the plaintiff can have no decree. 2 Mad. Ch. 184; 3 P. Wil. 310, Note 1.

"The contest, with respect to the right to the stock, is between the complainants and the bank; and it cannot be necessary to bring Lynn into the suit, in order to determine that question. He claims no right to the stock; and if the bank has established its right to hold it for the payment of Lynn's debt, the complainants have no pretense for requiring the books of the bank to be opened, and to permit the

transfer to be made as prayed in the bill. The bank cannot compel the complainants to bring Lynn before the court as a defendant; for the purpose of litigating questions between themselves, with which the complainants have no concern. No objection to the decree can, therefore, be made for want of proper parties."

This Court, in the case of *Salem Trust Co., petitioner* v. *Manufacturers Finance Co. et al., respondents*, 264 U.S. 182, 68 L. ed. 629, held:

> "That a mere custodian of a fund claimed by different persons is not an indispensable party to a suit between them to settle the claim * * *."

There is the desirability of preventing multiplicity of suits, and that there might be a complete and final decree between all the parties interested. Opposed to this is the desirability of having some adjudication, if at all possible, rather than none, that leaves the parties remediless due to an ideal desire to have all interested persons before the court. This was well expressed by Mr. Justice Southerland in *Bourdieu* v. *Pacific Western Oil Co.*, 299 U.S. 65, 81 L. ed. 42, as follows:

> "The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result. *West* v. *Randall* (C.C.), 2 Mason 181, 196, Fed. Cas. No. 17,424 (opinion by Mr. Justice Story); *Cole Silver Min. Co.* v. *Virginia & G. H. Water Co.* (C.C.), 1 Sawy. 685, 689, Fed. Cas. No. 2,990 (opinion by Mr. Justice Field); *Story, Eq. Pl.*, 8th ed., §§ 77, 96. And see *Russell* v. *Clark*, 7 Cranch. 69, 98, 3 L. ed. 271, 281; *Elmendorf* v. *Taylor*, 10 Wheat. 152, 167, 168, 6 L. ed. 289, 294, *Cf.* Equity Rule 39.

> "We refer to the rule established by these authorities because it illustrates the diligence with which courts of equity will seek a way to adjudicate the merits of a case in the absence of interested parties that cannot be brought in."

Whatever may be the result of the instant litigation, it cannot in any way possibly effect, prejudice or destroy rights of the mineral owners that may hereafter arise or be asserted by them as against either Carter or McCasland.

CONCLUSION

We therefore respectfully submit that the Petition of Carter for writ of certiorari to United States Court of Appeals to the Tenth Circuit be denied.

Respectfully submitted,

C. D. CUND,
P. O. Box 310,
Duncan, Oklahoma;

CLARENCE MCELROY,
Oklahoma National Bank Building,
Chickasha, Oklahoma,
Counsel for Respondents.

OWEN VAUGHN,
Oklahoma National Bank Building,
Chickasha, Oklahoma;

R. H. BROWN,
906½ Main Street,
Duncan, Oklahoma,
Of Counsel.

OCTOBER, 1951.

APPENDIX A

"WELLS DRILLED

TRACT No. 2—HORTON LEASE

Name	*Location*	*Date Completed*	*Total Depth*	*Woods Sand Zone Top*	*Bottom*
McCasland #3	100' West of center of NW¼ NW¼ NE¼ Sec. 17 (R. 45, 78, 92, 94)	Dec., 1947 (R. 80)	3684' (R. 68)	3575' (R. 69, Ex. 4)	3681'
*Carter Oil Co. #8	NE¼ NE¼ NW¼, Sec. 17 (R. 68)	9-19-48 (R. 68)	4314' (R. 217) 4200' whipstocked (R. 69)	4280' (R. 69, Ex. 4)	4294'

* Carter Oil No. 8 Horton is the whipstocked well. It was drilled on the 10 acres of land immediately west of the 10-acre tract upon which McCasland B. A. Horton No. 3 was drilled. It was drilled initially to a depth of 4,314 feet (R. 217) and completed at that depth January 20, 1948, as a dry hole. Pursuant to an application of The Carter Oil Company, and over the protest of McCasland (R. 254-255), the Corporation Commission of the State of Oklahoma granted Carter the right to whipstock this well. Carter came back up the hole to 2700 feet (R. 56) and whipstocked or directionally drilled the well to the east 220 to 230 feet (R. 136, 155).

TRACT No. 3—CARTER WOODS LEASE

Name	*Location*	*Date Completed*	*Total Depth*	*Woods Sand Zone* *Top*	*Bottom*
McCasland #4	SE¼ NW¼ NE¼ Sec. 17 (R. 69)	7-21-47 (R. 82)	3704′ (R. 83)	3006′ (R. 83)	3080′
*McCasland #5	SW¼ NW¼ NE¼ Sec. 17 (R. 70)	9-16-47 (R. 83)	3954′ (R. 83-85)	3831′ (R. 85, Ex. 4)	3932′
McCasland #7	SW¼ NW¼ NE¼ Sec. 17 (R. 70)	August, 1948	3560′ (R. 89)	3369′ (R. 91, 107)	3478′
*Carter Woods #4	SW¼ NW¼ NE¼ Sec. 17 (R. 70)	9-21-48 (R. 35)	4200′ (R. 85)	4054′ (R. 71-85, Ex. 4)	

*McCasland No. 4 Carter Woods was completed July 21, 1947. The Carter Oil No. 4 W. E. Woods was on the same 10-acre tract as the McCasland No. 5 Woods, and drilled about one year after the McCasland No. 5 Carter-Woods (R. 43). It was located 75 feet from the McCasland No. 5 Carter-Woods well (R. 85) and produced oil from the same common reservoir (Woods Sand Zone) as the McCasland wells."

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1951.

No. 338

The Carter Oil Company, *Petitioner,*

vs.

T. H. McCasland, N. W. Brillhart, Glenn Norville, Charles R. Rider, Thomas H. McCasland, Jr., Trust; Mary Frances McCasland, Trust; John Flack Burton, Trust; and James Leslie Burton, Trust,

Respondents.

REPLY BRIEF *of* PETITIONER.

A short reply brief may serve to correct some impressions sought to be left with the Court by the Answer Brief. In this Reply Brief, petitioner will be called Carter and respondents, McCasland.

A considerable portion of McCasland's Answer Brief is devoted to the merits of the case, and we think it is not appropriate that we undertake to reply to everything that is set forth. We are asking this Court to grant Certiorari and thereafter to review the case on the merits.

In *Palmer Oil Corporation* v. *Phillips Petroleum Company,* (1951) .... Okl. ...., 231 P. (2d) 997, 1012-1013, there is a definite expression which apprises this Court precisely what the Oklahoma State Supreme Court thinks of the questions herein presented as related to the rights of the parties under the contract. It doesn't matter at all whether that expression is in the syllabus of the case or appears only in the opinion itself. The thing of importance is that the Oklahoma Supreme Court has expressed itself on the very point involved and, for the purpose of Certiorari, we take it that is entirely sufficient.

From the Petition and Answer Brief already filed, the Court will know that actually the controversy comes down to one where the meaning of two phrases included in a single document must be arrived at to know the rights of the parties. Carter, in the assignment, granted to McCasland the leases in so far as they cover producing horizons above the depth of 4,000 feet, and Carter retained producing horizons below the depth of 4,000 feet with the right to produce the oil, gas and casinghead gas below that depth, all pursuant to the contract. There is nothing in the instrument which even remotely suggests that the rights of Carter are to be subordinated to those of McCasland. So far as the instrument shows, each has precisely the same right above and below the depth of 4,000 feet. The phrases are of equal dignity. There is no evidence in the record which tends to subordinate Carter's rights to McCasland's rights. The testimony of McCasland's own witnesses was entirely to the effect that a producing horizon is merely a sand or formation which is producing or may produce oil or gas (R. 74; R. 139, 140). Therefore, although respondents stress the grant to McCasland and minimize the reservation to Carter, yet the plain clear fact is that Carter retained whatever producing horizon or sand or formation that lay below 4,000 feet, just as McCasland received that same thing above 4,000 feet. When the grant and reservation are read together, they cannot be tortured into any other significance.

We freely say that McCasland is entirely correct that an oil and gas lease in Oklahoma gives exclusive right to the owner thereof to drill for and produce oil and gas from the leased land. That being true, the owner of a part of an oil and gas lease has the exclusive right to produce oil and gas from the part he owns. Carter owns the part below 4,000 feet and no one yet—neither opposing counsel nor the courts below—have given any reason why Carter does not have the same exclusive right that McCasland has to produce oil from its property. No adequate reason can be given.

On page 16 of McCasland's Answer Brief he sets out testimony from a deposition of Mr. F. W. Floyd. The deposition was taken by McCasland and was introduced by Carter. The testimony set out in McCasland's Answer Brief stops just short of showing exactly what Mr. Floyd actually said. That appears on page 233 of the record. After Mr. Floyd had testified that he wouldn't want to recommend the drilling of two wells close together (called twins) and that he wouldn't want to do it for contrariness, which obviously means he wouldn't want to do it just to cause the other fellow trouble or for spite, Mr. Floyd then testified postively:

Q. "I didn't ask that. As to the economics, if it would have been in your opinion a paying deal you would have recommended that?—A. Yes, sir.

Q. That is what I was talking about.—A. Yes, sir."

McCasland makes clear in paragraph 19 of his Answer Brief that Mr. Floyd formerly was Vice-President of Carter and negotiated an earlier contract which formed the pattern of the present contract, and that is true. It is just as true that, as such Vice-President of Carter, Mr. Floyd positively said that, if it would pay so to do, he would have recommended the drilling of the Woods Sand by Carter below 4,000 feet, notwithstanding McCasland had already drilled to a depth above 4,000 feet. Incidentally, the pattern contract referred to on page 19 of McCasland's Brief is the Mecklenburg contract which appears as defendant's Exhibit 11, commencing at page 270 of the record, and that contract does not make reference to "producing horizons" either in the WHEREAS clause or in paragraph 2 which is the paragraph calling for an assignment. The parties attach no significance to the term "producing horizons" except that it meant somewhere where oil might be had.

McCasland does not face up to the contract and assignment as they are written, and no more did the courts below. The opinion of the Court of Appeals for the Tenth Circuit says that Carter assigned to McCasland rights to oil

and gas producing horizons encountered at a depth of less than 4,000 feet (R. 289), and that court holds that, by reason thereof, McCasland has the right to take all oil from all horizons he encounters above 4,000 feet. This ignores Carter's reservation and, to be consistent, the court would have to hold that likewise Carter has the right to take all oil from all horizons it encounters below 4,000 feet. It is evident that the contract cannot give such right to both parties and it is equally evident that it does not give such right to either party. The court below does not address itself to the contract as written. Its opinion is palpably wrong and it ought to be corrected.

We respectfully ask that a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be granted herein.

Respectfully submitted,

VILLARD MARTIN,
GARRETT LOGAN,
National Bank of Tulsa Bldg.,
Tulsa, Oklahoma,

FORREST M. DARROUGH,
P. O. Box 801,
Tulsa, Oklahoma,

ALFRED STEVENSON,
Holdenville, Oklahoma,

Counsel for Petitioner.

WALTER DAVISON,
P. O. Box 801,
Tulsa, Oklahoma,
Of Counsel.

INDEX.

PAGE

Petition for rehearing 1

Certificate of counsel 6

Appendix—Opinion of Oklahoma Supreme Court of October 23, 1951, in The Carter Oil Co. *vs.* State, Van-Grisso Oil Co., *et al*..... 7

TABLE OF CASES.

City of Chicago, et al., v. Fieldcrest Dairies, Inc., 316 U. S. 168, 86 L. ed. 1355, 62 S. Ct. 986..... 5

Cowling v. Deep Vein Coal Co., (7th Cir.) 183 F. (2d) 652 5

Palmer Oil Corp. v. Phillips Petroleum Co., 231 P. (2d) 997, ... Okl. ...., ... 4

Railroad Commission of Texas, et al., v. Pullman Company, et al., 312 U. S. 496, 85 L. ed. 971, 61 S. Ct. 643 5

Spector Motor Service, Inc., v. McLaughlin, 323 U. S. 101, 89 L. ed. 101, 65 S. Ct. 152..... 5

The Carter Oil Co. v. State, Van-Grisso Oil Co., et al., Oklahoma Bar Journal of October 27, 1951..... 1,7

Thompson v. Magnolia Petroleum Co., et al., 309 U. S. 478, 84 L. ed. 876, 60 S. Ct. 628..... 5

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1951.

No. 338

The Carter Oil Company, *Petitioner,*
vs.
T. H. McCasland, N. W. Brillhart, Glenn Norville, Charles R. Rider, Thomas H. McCasland, Jr., Trust; Mary Frances McCasland, Trust; John Flack Burton, Trust; and James Leslie Burton, Trust,
Respondents.

PETITION *for* REHEARING.

Petitioner presents its petition for rehearing herein in order to call the Court's attention to a recent opinion of the Supreme Court of the State of Oklahoma, being the court of last resort in the State. The case is styled *The Carter Oil Company* v. *State, Van-Grisso Oil Company, et al.*, and the opinion is consistent with our contentions herein. It was decided October 23, 1951, and the opinion appears in the October 27, 1951, issue of the Oklahoma Bar Journal, being the official advance sheet publication of the Oklahoma Bar Association. The opinion is not yet elsewhere reported and, hence, a full copy thereof is attached including the syllabus. The controversy was with respect to the rights of the parties to have allocations of oil produced from the same Woods Sand formation which is involved in the instant case. The opinion reveals that the contract involved in the case was one whereby The Carter Oil Com-

pany which owned a 10-acre tract, being the SW SE SE, Sec. 6-3N-5W, Grady County, Oklahoma, assigned the oil and gas lease to T. H. McCasland "• • • insofar as said lease covers producing horizon above the depth of 4,000 feet," just as Carter assigned to McCasland in the instant case. Later Van-Grisso Oil Company, Norman W. Brillhart and Glenn S. Norville acquired interests of McCasland. McCasland, Brillhart and Norville were parties in both the *Van-Grisso* and the instant cases. The contract and assignment in the *Van-Grisso* case are in fact the Mecklenburg contract and assignment introduced in evidence by defendant in the instant case, the contract being defendant's Exhibit 11 (R. 270), and the assignment being defendant's Exhibit 2 (R. 260).

The *Van-Grisso* opinion shows that The Carter Oil Company had drilled a producing well on the 10-acre tract therein involved below the depth of 4,000 feet. Under the Oklahoma Corporation Commission Rule 202, only one well could be drilled on a 10-acre tract below the depth of 2500 feet unless an exception was granted. The allowable of oil to be produced from the tract was fixed at 200 barrels. The defendants in the *Van-Grisso* case, including McCasland, Brillhart and Norville, filed an application before the Oklahoma Corporation Commission for an exception by way of an order granting them the privilege of drilling a twin well to Carter's well on the 10-acre tract. This exception was granted and Van-Grisso and associates drilled the additional well. At the time of the hearing before the Commission, Carter's well was producing 93 barrels per day and Van-Grisso's well 55 barrels per day. Because Carter had drilled its well first and had taken 20,229 barrels of oil from its well before Van-Grisso, *et al.*, had drilled their well, the Corporation Commission undertook to limit Car-

ter's production to 10 barrels of oil per day and at the same time permit Van-Grisso to produce its well to its capacity of 55 barrels per day for such time as the amount of oil produced by Carter over and above what Van-Grisso had produced should be made up by Van-Grisso. There were other alternatives looking to future performance of the wells not material here. The Carter Oil Company took its appeal to the Supreme Court of Oklahoma from the Commission's order contending that the order was tantamount to holding that Van-Grisso, *et al.*, and Carter each owned one-half of the oil and gas in place, whereas, had the law been correctly applied and the rule of capture respected, Carter would have had the right to produce all the oil it could find from its well drilled below the depth of 4,000 feet, and Van-Grisso, *et al.*, likewise would have had the right to produce all the oil they could find from their well drilled above the depth of 4,000 feet, provided the combined production from the two wells did not exceed the 200-barrel per day allowable. The Oklahoma Supreme Court upheld Carter's contention and expressly held that the attempt of the Oklahoma Corporation Commission to limit the production of Carter's well as aforesaid deprived it of its property rights in the oil under its lease without due process of law and was, therefore, violative of the Federal and Oklahoma State Constitutions.

In arriving at its decision, the Oklahoma Supreme Court, of necessity, recognized that both Carter and Van-Grisso had property rights in the oil to be produced in their respective areas above and below the depth of 4,000 feet. *This notwithstanding there was no express reservation either in the contract or the assignment on the part of The Carter Oil Company to the oil rights below the depth of 4,000 feet.* The contract provided for the grant of rights

above 4,000 feet and the assignment granted producing horizons above that depth. Nevertheless, in reaching its decision the Oklahoma Supreme Court said:

> "Carter's lease authorized it to produce oil from any point below 4,000 feet from the surface of the land. Van-Grisso's lease authorized it to produce from a well at any point above the 4,000-foot level."

This is directly in accord with petitioner's contentions in this case. It recognizes the rule of capture and it gives a proper construction to the contract and assignment. This construction can be applied with even more validity to the contract and assignment in the instant case where petitioner, in so many words, in its assignment reserves to itself producing horizons below the depth of 4,000 feet.

We have stressed in our Petition for Certiorari the fact that the Oklahoma Supreme Court has actually determined this question in accordance with our contentions in the case, *Palmer Oil Corporation* v. *Phillips Petroleum Company,* .... Okl. ...., 231 P. (2d) 997. Any doubt on this score should now be dispelled by the light shed by the opinion in the *Van-Grisso* case.

As respondents have stated on page 2 of their brief herein, the oil structure herein involved extends some 3½ miles. It is a prolific oil producing structure. Other similar farmout contracts have been made affecting this same structure. Also these farmout contracts are prevalent in practically every oil producing area in Oklahoma which is a large oil producing state. The true interpretation of the contract is important and is a matter of state concern. We think the Oklahoma State Supreme Court has announced the true interpretation of such farmout contracts, but if this Court is not now convinced that such is the case, then we think this Court should grant certiorari herein and with-

hold decision on the merits so as to give petitioner an opportunity forthwith to institute a suit in the Oklahoma state court to secure direct interpretation of the contract. This Court heretofore has exercised its authority in this manner in the case, *Thompson* v. *Magnolia Petroleum Company, et al.,* 309 U. S. 478, 84 L. ed. 876, 60 S. Ct. 628, where it pointed out that the true interpretation of an instrument affecting valuable oil rights should be arrived at by the state court, and said:

> "Unless the matter is referred to the state courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of Federal jurisdiction—been determined contrary to the law of the state which in such matters is supreme."

Accordingly this Court reversed the Court of Appeals and directed the District Court to modify its former holding so as to provide appropriate submission of the question of the fee simple ownership to the local state court. Likewise, the Court of Appeals for the Seventh Circuit, in *Cowling* v. *Deep Vein Coal Company,* 183 F. (2d) 652, of its own volition suggested to the parties that they seek the proper interpretation of a mineral deed by the local court in Indiana on authority of *Spector Motor Service, Inc.,* v. *McLaughlin,* 323 U. S. 101, 89 L. ed. 101, 65 S. Ct. 152; *City of Chicago, et al.,* v. *Fieldcrest Dairies, Inc.,* 316 U. S. 168, 86 L. ed. 1355, 62 S. Ct. 986, and *Railroad Commission of Texas, et al.,* v. *Pullman Company, et al.,* 312 U. S. 496, 85 L. ed. 971, 61 S. Ct. 643. The Court remanded the case to the District Court and directed that court

> "to retain jurisdiction for a reasonable time until the parties can litigate the questions here raised in the courts of Indiana, or may otherwise dispose of the cases."

We respectfully ask this Court to reconsider its ruling on our Petition for Certiorari and, upon rehearing, to grant such petition and consider this case on the merits or withhold decision so as to give petitioner an opportunity to institute an action in the Oklahoma courts and secure an answer to the issues herein raised from the court of final jurisdiction in the State of Oklahoma.

Respectfully submitted,

VILLARD MARTIN,
GARRETT LOGAN,
National Bank of Tulsa Bldg.,
Tulsa, Oklahoma,

FORREST M. DARROUGH,
P. O. Box 801,
Tulsa, Oklahoma,

ALFRED STEVENSON,
Holdenville, Oklahoma,
Counsel for Petitioner.

WALTER DAVISON,
P. O. Box 801,
Tulsa, Oklahoma,
Of Counsel.

Forrest M. Darrough, one of counsel for petitioner admitted to practice before the Supreme Court of the United States, certifies that the above Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 33(2) of the Supreme Court Rules.

.....,
FORREST M. DARROUGH.

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA.

The Carter Oil Company, a corporation, Appellant *vs.* State of Oklahoma, Reford Bond, Ray O. Weems and Ray C. Jones, Comprising the Corporation Commission of the State of Oklahoma, Van-Grisso Oil Company, T. H. McCasland, Norman W. Brillhart, Glen S. Norville, and Republic Natural Gas Company, a corporation, Appellees.—No. 34122.

SYLLABUS.

1. Under Article 9, Sec. 20, of the Constitution of the State of Oklahoma, the Supreme Court review of appealable orders of the Corporation Commission shall be judicial only, and in all appeals involving an asserted violation of any rights of the parties under the constitution of the United States, or the Constitution of the State of Oklahoma, the court shall exercise its own independent judgment as to both the law and the facts.

2. Under the above provision of the Constitution, it is provided that in all other appeals from the orders of the Corporation Commission the review of the Supreme Court shall not extend further than to determine whether the Commission has regularly pursued its authority, and whether the findings and conclusions of the Commission are sustained by the law and substantial evidence.

3. Under 52 O. S. Supp., 1949, Sec. 87.1 (a), (b), (c) and (d), the legislature has expressed and defined the powers of the Corporation Commission in the exercise of its administrative control over the production of oil and gas and under these statutory provisions the Commission can only exercise its jurisdiction as it affects pools where it has established well-spacing, drilling, or zoning units, and where the Commission after hearings has determined that the or-

ders are necessary under the state police powers for the prevention of waste as specifically defined in the statute.

4. Under the record made before the Corporation Commission, the evidence shows that the Commission has not established a well-spacing, drilling, or zoning as applied to the Carter-Knox Woods pool, within which pool the two wells in question were drilled. Therefore, the provisions of the statute referred to in paragraph 3 of the syllabus do not apply.

5. Under the Session Laws of 1947, page 327, Sec. 4, and subsequent amendment, Title 52, O. S. Supp., 1949, Sec. 86.4, the legislature authorized the Corporation Commission to promulgate rules and regulations applicpable to each common source of supply and to make general orders, rules, and regulations applicable alike to all common sources of supply in the state, but under this grant of power the legislature expressly stated under the statute here considered "that the Corporation Commission shall not, under the provisions of this act, make any order establishing a well-spacing or drilling unit."

6. Under the Corporation Commisison's rule 202 a well drilled for oil to a common source of supply in excess of 2500 feet shall be located not less than 330 feet from any lease line and not less than 600 feet from another producing well, unless otherwise permitted by the Commission. The Commission's order authorizing the drilling of the second well was a valid order.

7. Where one lessee holds a lease on a ten-acre tract within the pool in question covering all production of oil at depths below the 4000-foot level, and another lessee holds a lease on all oil production above the 4000-foot level, and where the lessee holding the lease covering the lower level drills a well to a depth of more than 4000 feet, it is entitled under rule 202 to produce the well from the lower level if within the maximum allowable as established by the Corporation Commission's order applicable to units within the pool.

8. Where the lessee holds the lease on the same ten-acre tract to depths above the 4000-foot level, it must, under rule 202, apply to the Corporation Commission for permission to drill the second well. Upon proper application the Commission is authorized to grant the lessee permission to drill the additional well to a depth of 4000 feet as provided in its lease contract, and said lessee is entitled to produce said well within the allowable production as allocated to said unit by the Commission.

9. Where the lessee's well producing oil at a depth below the 4000-foot level was capable of producing 93 barrels daily as of the date of the Corporation Commission's order, and the lessee's well producing at a depth of less than 4000 was capable of producing 55 barrels of oil daily as of that date, and the lessee's well under the 4000-foot level was completed in April, 1948, and the lessee's well above the 4000-foot level was completed in November, 1948, and where the Commission had not established well-spacing, drilling or zoning units under the applicable statutes, the Corporation Commission exceeded its authority under its order to allocate the allowable production equally between the two wells.

10. Under the oil and gas conservation laws of the State of Oklahoma, an order of the Corporation Commission which fixes or limits the daily allowable production of oil from a unit within a common source of supply of an oil producing area, to an amount of oil less than the amount allowed other similar units within said common source of supply is contrary to law.

11. The law of capture under which oil and gas belongs to the one who reduces it to possession obtains in Oklahoma except as it is or may be modified under laws enacted under the police power, such as proration and spacing statutes, and zoning ordinances. Such statutes and ordinances are not self-executing. They simply authorize administrative boards to issue orders that have the effect of regulating or abrogating, in a measure, the law of capture.

12. Where the Corporation Commission's order is in derogation of valid statutory enactments governing the Commission's power and authority to regulate the drilling and production of oil and gas wells, thereby depriving a producer of his property without due process of law, such order impinges on the guarantees embraced within the periphery of the federal and state constitutions, and is thereby void.

13. Where the Commisison's findings and order are based on the testimony of two expert witnesses, one stating the upper level formation well produces approximately 75% of recoverable oil, and the lower level well approximately 25% of the recoverable oil, and the other expert stating the lower level will produce approximately 75% and the upper level approximately 25% of the recoverable oil, and the Commission finds the evidence to be "almost of diametrical opposites" and without more finds that each lessee is entitled to 50% of the oil to be produced from the unit, said finding and order based thereon is not sustained by the evidence, and therefore is contrary to law.

APPEAL FROM THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA.

Appeal from the order of the Corporation Commission making division of allowable production from a common source of supply.

REVERSED AND REMANDED.

W. T. Anglin, Holdenville, Okla.; Forrest M. Darrough, Tulsa, Okla.; Joseph A. Gill, Tulsa, Okla.; John L. Cravens, Oklahoma City, Okla., for Appellant.

Floyd Green, Conservation Attorney, Corporation Commission; C. D. Cund, Duncan, Oklahoma; T. Murray Robinson, Oklahoma City, Okla., for Appellees.

O'NEAL, J.

This is an appeal from an order of the Corporation Commission of the State of Oklahoma, fixing the allowable

production of oil from a ten-acre tract of land, and fixing the amount of percentage thereof to be taken by The Carter Oil Company, the holder of an oil and gas lease covering said ten-acre tract as to oil and gas produced below the 4000-foot level below the surface, and Van-Grisso Oil Company, the holder of an oil and gas lease covering said tract as to the oil and gas to be produced from above the 4000-foot level below the surface.

The Carter-Knox-Woods pool is a source of supply of oil and gas underlying several sections of land in Township 3 North, Range 5 West, Grady County. The productive portion of the formation is quite narrow horizontally, being approximately 600 to 700 feet wide running in a northwest and southeast direction. The productive portion of said formation is so situated within the section as to dip from the northeast to the southwest at an angle of approximately sixty degrees and is to a depth of approximately 4000 feet, extending from several feet above said depth to several feet below that depth. The Carter Oil Company owned an oil and gas lease covering the ten-acre tract here involved, namely: The Southwest Quarter of the Southeast Quarter of the Southeast Quarter of Section 6, Township 3 North, Range 5 West of the I. M. On May 26, 1938, it assigned said oil and gas lease to T. H. McCasland "insofar as said lease covers producing horizon above the depth of 4000 feet." Later Van-Grisso Oil Company, Norman W. Brillhart and Glen S. Norville acquired a part of the interest of McCasland. Under the lease as now owned The Carter Oil Company asserts the right to produce oil and gas in said formation below the depth of 4000 feet and Van-Grisso Oil Company and associates assert the right to produce from above the depth of 4000 feet.

In April, 1948, The Carter Oil Company drilled, and completed for production, a well on said tract about eighty feet west of the center of said tract. Thereafter, May 17, 1948, Van-Grisso Oil Company and associates filed an application with the Corporation Commission for permission

to drill a well on said ten-acre tract, as an exception to the Commission's rule 202, which, without such exception, prohibited the drilling of another well below the depth of 2500 feet. The application stated the matter of divided lease ownership; the drilling of a well by The Carter Oil Company, and alleged refusal of The Carter Oil Company to recognize the right of applicant to share in the production of said well, and asserted that unless permission were granted to drill the additional well under an exception to rule 202 of the Commission, they would lose oil rightfully belonging to them.

The application was set for hearing June 11, 1948, before W. H. Sollers, Trial Examiner, at which time W. D. Grisso produced evidence in support of the application. At that hearing W. D. Grisso, representing the applicants, suggested that the matter of division of the allowable production as between the two wells be deferred until after the Van-Grisso well had been drilled so that the capacities of the respective wells could be ascertained and more exact information as to the producing formation might be made known. The Carter Oil Company requested that a temporary division of allowable be fixed prior to the drilling of the Van-Grisso well to be effective upon completion of such well and pending final hearing on the question of division of the allowable production.

Van-Grisso and Republic Natural Gas Company owned a lease on the ten-acre tract directly south of the Carter-Van-Grisso ten-acre tract. They had drilled a well on the south ten-acre tract and filed a consent and waiver as to the drilling of the second well on The Carter-Van-Grisso ten-acre tract. After said hearing, and based thereon, the report of the Trial Examiner recommended, and the order of the Corporation Commission granted permission to Van-Grisso to drill the additional well, and fixed temporary division of the normal per well allowable of 200 barrels per day at 50% to each well in the event the Van-Grisso well be completed as a producer. This order was dated June 22, 1948. On or about October 22, 1948, Van-Grisso com-

menced the drilling of their well and completed it as a producer on November 23, 1948. On November 30, 1948, VanGrisso and associates filed an application for an order by the Commission fixing a percentage division of the allowable of the two wells. Hearing was had on this application January 5, 1949, resulting in findings of fact and an order: • • • (2) That the allowable from said tract be fixed at the allowable production for other tracts in a common source of supply, or the capacity of the larger well on the tract, whichever is the smaller; (3) That the Conservation Department make quarterly tests of the capacity of the two wells to produce, for the purpose of fixing the allowable production from said tract; (4) That each of the two wells be allowed to produce fifty per cent of the allowable from the tract as of June 22, 1948, and that all oil produced from said tract subsequent to that date be divided equally between the owners of the two wells located on said tract;

> "(5) That the production from the Carter Oil Company's well should be hereafter limited to 10 barrels of oil per day, and the applicants herein should be permitted to produce the remainder of the allowable from said tract from their well until such time as the amount of oil produced from said tract subsequent to June 22nd, 1948, has been produced equally by both parties, and that when such production has been equalized, then the parties should be permitted to produce from said common source of supply underlying said tract of land, equal amounts of the allowable production therefrom."

And:

> "(6) That in the event either of said wells are not capable of producing its share of the oil allowed to be produced from said tract, then the other wells (sic) should be permitted to produce only such percentage of its share of the allowable production."

The Carter Oil Company appeals from said findings and order.

The first contention of The Carter Oil Company is that the retroactive provision of the order of the Corporation Commission making the division of the allowable production of the two wells effective prior to the completion of the second (Van-Grisso) well, is contrary to the applicable law and to the evidence presented in the matter.

The uncontradicted evidence is that The Carter Oil Company completed its well in April, 1948, in the Woods Sand formation below a depth of 4000 feet. The Trial Examiner found that The Carter Oil Company has drilled a well for oil and gas on said ten-acre tract of land to the Dornick-Hills-Woods sand to a depth of about 4200 feet, and set their casing at a depth of 4005 feet below the surface, and are producing oil from said well at a depth of 4005 feet; that the Dornick-Hills-Woods sand was encountered at a depth of 3986 feet.

As above stated, the Corporation Commission approved said finding and entered an order permitting Van-Grisso and associates to drill a well on said ten-acre tract to a depth of 4000 feet for the purpose of producing oil that may be recovered above said depth which belongs to them; that the allowable for wells in that area is 200 barrels per day, and if the well to be drilled by applicants (Van-Grisso and others) is a producing well, the allowable for the unit upon which these two wells are located shall be divided equally between the two wells; that the Corporation Commission should retain jurisdiction over this matter so that when all available information is had and presented, they may adjust the equities between the owners and operators of the two wells, and fix the allowable for the two wells. The evidence shows that between June 22, 1948, and November 23, 1948, The Carter Oil Company well produced 20,229 barrels of oil. The order of the Corporation Commission, not directly, but in effect, required The Carter Oil Company to account to Van-Grisso and associates for the one-half of the 20,229 barrels of oil produced during said period. It required The Carter Oil Company to re-

duce its rate of taking to ten barrels of oil per day until Van-Grisso and associates shall have equalized said production by producing from their well the difference between the ten barrels per day and the allowable for the unit, or as much thereof as the Van-Grisso well is capable of producing. During the first twenty-three days of November, 1948, The Carter Oil Company well produced at the rate of more than 100 barrels per day. At the time of the hearing said well was producing at the rate of 93 barrels per day. The Van-Grisso well was then producing about 55 barrels per day. The allowable as above noted for the unit was 200 barrels per day, or the capacity of the larger of the two wells, whichever was the lesser. Therefore the allowable for the unit was about 93 barrels per day. The Van-Grisso well was capable of producing only about 55 barrels of oil per day. Therefore, under the order of the Corporation Commission reducing the amount of oil which The Carter Oil Company was permitted to take during the equalization period to ten barrels of oil per day, all the unit would be permitted to take would be about 65 barrels per day, thereby reducing the allowable for the unit to about 28 barrels of oil per day less than the allowable for the unit under the rules of the Commission. That would work a great injustice, not only to The Carter Oil Company, but to the royalty owners under the lease. The latter would be losing one-eighth of about 28 barrels of oil per day during the entire equalization period which we estimate at about 450 days, assuming that the Van-Grisso well will continue to produce as much as 55 barrels per day. The loss to the royalty owners alone would amount to about 1575 barrels of oil. The loss to The Carter Oil Company would be much greater.

There was no well spacing order as applied to the Carter-Knox-Woods pool. Rule 202 of the Corporation Commission applicable, as we take it, to all producing fields, or pools, in the State, provides that a well drilled for oil and gas to a common source of supply in excess of 2500 feet in

depth shall be located not less than 330 feet from any property line, or lease line, and shall be located not less than 600 feet from any other producing or drilling oil and gas well, unless otherwise specifically permitted by order of the Commission, upon hearing; with the proviso that the rule shall not be applicable, if the operator proposing to drill files with the Commission a waiver or consent in writing signed by the lease owner towards whom the well location is proposed to be moved. This has the effect of a ten-acre spacing in the absence of a specific spacing order.

The order of the Corporation Commission, in effect, holds that The Carter Oil Company and the Van-Grisso Oil Company and associates are the owners of an oil and gas lease covering the ten-acre tract involved in such proportion that from and after June 22, 1948 (the date Van-Grisso and others were given permission to drill their well) each were entitled to take one-half of the allowable production of said tract; that the allowable production of the tract is 200 barrels of oil per day, or the capacity of the larger well drilled thereon. The Carter Oil Company had already drilled a well near the center of the tract which, on June 22, 1948, was producing more than 100 barrels of oil per day. Van-Grisso and others did not commence their well until October 22, 1948, and did not complete it to production until November 23, 1948.

The Carter Oil Company continued to produce from its well, and during that 154 days produced and took 20,229 barrels of oil from its well. The effect of the order of the Corporation Commisison is to say to The Carter Oil Company you have, since June 22, 1948, taken from the common source of supply 20,229 barrels of oil which you were not entitled to take because Van-Grisso and associates were entitled to take a like amount but were unable to do so. For that the Corporation Commission will now cut or limit the amount of oil you may take in the future to 10 barrels of oil per day and will allow Van-Grisso and others to take all of the balance of the allowable from the ten-acre tract

until such time as the amount produced from said tract subsequent to June 22, 1948, has been produced equally by both parties, and that when such production has been equalized, and thereafter, the parties should be permitted to produce from said common source of supply underlying said tract of land equal amounts of the allowable produced.

The Carter Oil Company contends that the effect of said order is to say that as of June 22, 1948, one-half of the oil in place under said tract belonged to Van-Grisso, and the other one-half belonged to The Carter Oil Company. They contend that the effect of the order is not much short of an attempt to give Van-Grisso a judgment for one-half of the oil produced by Carter during the period.

From a consideration of the entire record, it is our view that the order of the Corporation Commisison entered as of March 8, 1949, is invalid and void for two reasons:

1. The order as appears on its face is void because it is retroactive in that the order allows each well to produce 50% of the allowable capacity of the two wells to produce as of June 22, 1948; that after the date of the order (March 8, 1949) here complained of, The Carter well is limited to a production of ten barrels of oil per day, and that the Van-Grisso well is permitted to produce the remainder of the allowable from said tract from its well until such time as the amount of oil produced from said tract subsequent to June 22, 1948, has been produced equally between said parties; that the effect of the order deprives Carter of its property rights without due process of law in the oil produced from its lease, and thereby deprives it of its property in violation of the federal and state constitutions.

Consideration must be given to rules 202 and 312 of the Corporation Commission under which the Commission's power and authority was here involved. Under rule 202 a well drilled for oil in a common source of supply in excess of 2500 feet in depth shall be located not less than 330 feet

from the property or lease line, and not less than 600 feet from any other producing or drilling well. The rule then provides that the rule shall not apply if the operator proposing to drill files with the Commission a waiver in writing signed by the lease owner towards whom the well location is proposing to be moved. Rule 312 provides:

> "The allowable for any well drilled upon a tract containing less than the unit acreage authorized by the Commission or at a location which does not conform to the pattern established by the Orders of the Commission for the common source of supply shall be adjusted in the ratio that the attributable productive acreage in the unit, as shown by testimony in hearing before the Commission, bears to the established unit acreage."

We have held in *H. F. Wilcox Oil & Gas Company* v. *Walker,* (1934) 169 Okl. 33, 35 P. (2d) 893, and in kindred cases, that the authority of the Commission to act in connection with prevention of waste and proration that its powers and authority are granted by statute, and its acts are circumscribed thereby, or by necessary implication conferred upon it. Also, *Grison Oil Corporation* v. *Corporation Commission,* (1940) 186 Okl. 548, 99 P. (2d) 134; *H. F. Wilcox Oil & Gas Co.* v. *Walker, et al.,* 168 Okl. 355, 32 P. (2d) 1044.

It is here asserted that the power and authority of the Commission to promulgate the order is vested in the Commission by virtue of the statute (Title 52, O. S. Supp., 1949, Sec. 87.1 (a), (b), (c) and (d)) which statute expresses and defines the powers of the Commission in administering the law applicable to those pools where *well-spacing or drilling units* have been established. The record here shows that the Commission has not by order, or otherwise, established well spacing or drilling units in the Carter-Knox-Woods pool. The drilling of wells in the pool is therefore limited here solely by the Commission's rule 202. The powers of the Commission as relied on by the quoted

statute are inapplicable here for the reason, as stated, no well-spacing or drilling units have been established by the Commission. We so held in *Croxton* v. *State,* 186 Okl. 249, 97 P. (2d) 11. We cannot subscribe to the contention presented that the effect of the Commission rule 202 establishes the acreage as a well-spacing and drilling unit. That rule simply establishes the location of a drilling site and no more. Unit lines must be established by a proper procedure. That contention is laid at rest by Title 52, O. S. Supp., 1949, Sec. 86.4, which rules provides:

> "The Commission is hereby empowered after notice of hearing to make all such orders, rules and regulations applicable to each common source of supply as it may find to be necessary or proper and to make general orders, rules and regulations applicable alike to all common sources of supply in the State. It shall not be necessary to publish such order, rule or regulation, after its adoption or promulgation by the Commission, before it shall go into effect, nor shall it be necessary to publish any such order, rule or regulation in each subsequent annual report of the Commission. *Provided, that the Corporation Commission shall not under the provisions of this Act make any order establishing a well spacing or drilling unit.*"

After the Commission granted Van-Grisso the authority to drill a twin well (which order was dated June 22, 1948) Van-Grisso delayed drilling operations until October, 1948, and completed its well in November of 1948. Carter had completed its well in April of 1948. Carter drilled its well under authority of rule 202 and Van-Grisso under authority of the exception provided in said rule. Carter's lease authorized it to produce oil from any point below 4000 feet from the surface of the land. Van-Grisso's lease authorized it to produce from a well at any point above the 4000-foot level. No legal restrictions were imposed upon these contract rights of the parties. The Corporation Commisison, under its statutory power, limited the

production from each comparable tract of ten acres within the pool area to a daily take of 200 barrels. As the Carter and the Van-Grisso wells were incapable of producing the maximum allowable, the Commission was without statutory power to make and enforce the order here complained of. This for the reason that the Commission's power and authority was one limited to restraint only, in the event that the owners of the wells exceeded the maximum production established by the Commission's previous order. *Gruger* v. *Phillips Petroleum Company,* 192 Okl. 259, 135 P. (2d) 485.

Here, however, the Commission went beyond this limitation. It assumed the power to make an apportionment of the unit allowable. The Carter well, at the time of the entry of the order, was capable of producing ninety-three barrels daily, and the Van-Grisso well fifty-five barrels daily. This combined production fell short by fifty-two barrels the maximum allowable attributable to the unit. Moreover, the Commission's order, as indicated, provided that each of said wells shall be allowed to produce 50% of the allowable production from the tract as of June 22, 1948 (a date five months preceding the completion of the Van-Grisso well as a producer) and then added the additional burden on Carter that its well, as of the date of the Commission's order, March 8, 1949, be limited to a production of ten barrels of oil daily, and that the Van-Grisso well be permitted to produce the remainder of the allowable from said tract from its well until such time as the amount of oil produced from said tract subsequent to June 22, 1948, has been produced equally by both parties, and that when such production has been equalized, then the parties should be permitted to produce from said common source of supply, underlying said tract of land, equal amounts of the ten-acre unit allowable. It will be readily seen that adding Van-Grisso's fifty-five barrel capacity to the Carter ten-barrel restricted allowable, falls short by 28 barrels the maximum capacity of the Carter well. The Commission had the power to establish the maximum production from the ten-acre unit, thereby protecting adjacent producing units on a com-

parable allowable, but it had no authority to allocate the allowances between these two producers, this for the reason no restraint was here necessary, as both parties were producing within the limits of the Commission's unit allowable.

We think the Commission fell in error in assuming to act under the statute, Title 52, O. S. Supp. 1949, Sec. 87.1 (a), (b), (c) and (d), but these statutes, as indicated, only apply to those pools where well-spacing or drilling units and zoning ordinances have, under the authority of this statute, been established by the Commission. These statutes may be invoked by the Commission to prevent waste and ratable takings of production under well-spacing and unit operations, and to prevent waste of a natural resource of inestimable value to the general welfare of the people as a whole. The authority is inherent under the police power of the state.

Questions under these statutes were not before the Commission. Its jurisdiction, as indicated, was invoked under its rule 202 for permission to drill a twin well on the ten-acre unit, and the exception provided thereunder for an additional well.

The order of the Commission here considered we hold it to be in excess of the Commission's power and authority, and is thereby void.

2. The order of the Commission (if conceded to be within its jurisdiction) cannot be sustained here because it is not supported by any competent evidence. In fact, the order is directly opposite to the undisputed evidence in the record. In *Wilcox Oil and Gas Company* v. *State,* 162 Okl. 89, 19 P. (2d) 347, it was held:

> "If the Corporation Commission is to sit as a court and make orders which have the effect of judgments for the closing of producing oil wells, it must proceed in an orderly manner and base its orders on competent evidence * * *."

As already indicated, the Commission order allowed each well to produce 50% of the allowable production from the tract as of June 22, 1948, and the production after said date to be divided equally between the owners of the two wells. The Commission's rule 312 provides, in part, as follows:

> "The allowable for any well drilled upon a tract containing less than the unit acreage authorized by the Commission or at a location which does not conform to the pattern established by the Orders of the Commission for the common source of supply shall be adjusted in the ratio that the attributable productive acreage in the unit, as shown by testimony in hearing before the Commission, bears to the established unit acreage."

If rule 312 is properly applicable to the issues here presented, we find the evidence is not in support thereof. Carter and Van-Grisso each called a geologist to testify in support of their respective claims as to the percentage of oil that might be recovered from the productive sand underlying their respective wells. The order summarized their testimony as follows:

> "There is a very wide variance between the testimony of the applicants and the testimony of The Carter Oil Company as to the percentage of oil and gas, in said common source of supply, that each is entitled to produce; highly skilled geologists educated and experienced, each having access to the same subsurface and surface geological data, have reached technical and scientific conclusions that are almost of diametrical opposites."

Although the Commission found that the evidence is "almost of diametrical opposites" they found and held that each party was entitled to produce 50% of the production from the unit. There being no further or other evidence offered we are constrained to the view that the order is not supported by substantial evidence as required by law. Sub-

stantial evidence means evidence of substance, and which induces conviction. *Pannell, et al.,* v. *Farmers Union Co-operative Gin Association of Sterling,* (1943) 192 Okl. 652, 138 P. (2d) 817.

Boards of quasi-judicial powers must base their findings and orders on substantial evidence. This Court is vested by virtue of the Constitution of Oklahoma with the power to examine into the record on appeal from the Corporation Commission whether in fact the findings and conclusions of the Commission are sustained by law and substantial evidence.

Here where the order complained of impinges on asserted constitutional rights, the court is authorized to exercise its own independent judgment as to both the law and the facts. See Article 9, Section 20, of the Constitution of Oklahoma as amended under authority of Section 35 of said Article. One other suggestion is presented that the order of allocation, being retroactive in character, is not valid. This on the ground that the allocation orders of the Commission are legislative in character and can only act prospectively. *Sterling Refining Company* v. *Walker,* 165 Okl. 45, 25 P. (2d) 312.

The full consideration of the record unerringly leads to the conclusion that the order here is not supported by any substantial evidence and is therefore contrary to law.

The Corporation Commission order No. 22167, insofar as it is in opposition to the views herein expressed, is reversed.

HALLEY, V.C.J., and WELCH, CORN, GIBSON, JJ., Concur;

BINGAMAN, J., Concurs in conclusions.

FILED
NOV 19 19
CHARLES ELMORE

No. 338

In The
Supreme Court of the United States

October Term, 1951

THE CARTER OIL COMPANY,
Petitioner,
VERSUS

T. H. MCCASLAND, N. W. BRILLHART, GLENN NORVILLE, CHARLES R. RIDER, THOMAS H. MCCASLAND, JR., Trust; MARY FRANCES MCCASLAND, Trust; JOHN FLACK BURTON, Trust; and JAMES LESLIE BURTON, Trust,
Respondents.

RESPONSE TO PETITION FOR REHEARING

C. D. CUND,
P. O. Box 310,
Duncan, Oklahoma;

CLARENCE MCELROY,
Oklahoma National Bank Building,
Chickasha, Oklahoma,
Counsel for Respondents.

OWEN VAUGHN,
Oklahoma National Bank Building,
Chickasha, Oklahoma;

R. H. BROWN,
906½ Main Street,
Duncan, Oklahoma,
Of Counsel.

NOVEMBER, 1951.

KING LAW BRIEF CO., 222 N.W. THIRD, OKLAHOMA CITY — PHONE 3-2969

INDEX

	PAGE
Reasons for Denying Carter's Petition for Rehearing	2
Argument	2
Proposition I: Said Petition was not filed pursuant to or in conformity with Sub-division 2 of Rule 33 of this Court	2
Authority— Sub-division 2 of Rule 33 of this Court	2
Proposition II: The statements contained in the Van-Grisso opinion (attached to Carter's Petition for Rehearing as appendix or exhibit) upon which Carter strongly relies are dicta	3
Authority—	
Corbin v. Wilkinson, 175 Okl. 247, 52 P. 2d 45	5
Van-Grisso Opinion	4
Section 52, O. S. Supp. 1949, Sec. 87.1 (a), (b), (c) and (d)	4
Proposition III: The decision in the Van-Grisso case has not become final as the extended time for filing Petition for Rehearing in said case will not expire until December 7, 1951	6
Proposition IV: Carter's request that: "The decision of this case be withheld to give it opportunity to institute an action in the Oklahoma courts and to secure an answer to the issues herein raised from the court of final jurisdiction of the State of Oklahoma," should be rejected by this Court	6

PAGE

Authority—

Estate of Sidney M. Spiegel v. Commr. of Internal Revenue, 335 U. S. 701, 93 L. ed. 330 10

Helvering v. Stuart, 317 U. S. 154, 87 L. ed. 154 ..... 9, 10

Meredith v. Winterhaven, 320 U. S. 227, 88 L. ed. 9 10

Propper v. Clark, 337 U. S. 472, 93 L. ed. 1480 10

Williams v. Green Bay & W. Ry. Co., 326 U. S. 549, 90 L. ed. 311 10

Section 1332 of the Judicial Code 8

28 U. S. C. A. 2201 9

Conclusion 10

No. 338

In The
Supreme Court of the United States

October Term, 1951

THE CARTER OIL COMPANY,
Petitioner,

VERSUS

T. H. MCCASLAND, N. W. BRILLHART, GLENN NORVILLE, CHARLES R. RIDER, THOMAS H. MCCASLAND, JR., Trust; MARY FRANCES MCCASLAND, Trust; JOHN FLACK BURTON, Trust; and JAMES LESLIE BURTON, Trust,
Respondents.

RESPONSE TO PETITION FOR REHEARING

Petitioner will be designated herein as Carter. The respondents will be designated as McCasland *et al.*

This Court should deny Carter's Petition for Rehearing for the following reasons, to-wit:

(1) Said Petition was not filed pursuant to or in conformity with Sub-division 2 of Rule 33 of this Court.

(2) The statements contained in the Van-Grisso opinion (attached to Carter's Petition for Rehearing as appendix or exhibit) upon which Carter strongly relies are dicta.

(3) The decision in the Van-Grisso case has not become final as the extended time for filing the Petition for Rehearing in said case will not expire until December 7, 1951.

ARGUMENT

PROPOSITION I

Said Petition was not filed pursuant to or in conformity with Sub-division 2 of Rule 33 of this Court.

Sub-division 2 of Rule 33 requires that a Petition for Rehearing must be "confined to intervening circumstances of substantial or controlling effect, or to other substantial grounds available to petitioner although not previously presented." The *Van-Grisso case* was decided by the Supreme Court of the State of Oklahoma on October 23, 1951. The Carter Oil Company and its attorneys had a copy of the opinion mailed to them by the clerk of the Supreme Court on the date the case was decided in accordance with the custom of the Court and, in the ordinary course of mail, should have received this opinion on October 24, 1951. The Petition for Writ of

Certiorari in this case was denied by this Court on November 5, 1951, some twelve days after the Carter Oil Company and its attorneys had full notice and knowledge of the decision of the Supreme Court of the State of Oklahoma in the *Van-Grisso case.*

With a full knowledge of the opinion of the Oklahoma Supreme Court in the *Van-Grisso case,* the Carter Oil Company did not call that decision to this Court's attention but preferred to gamble upon the ruling of this Court on its Petition for Writ of Certiorari and if it lost its gamble by having such Petition for Writ of Certiorari denied, then to file a Petition for Rehearing and for the first time call to this Court's attention a decision of the Supreme Court of the State of Oklahoma, not yet final, rendered some twelve days prior to this Court's denial of the Writ of Certiorari.

Carter does not call this Court's attention to substantial grounds available to the petitioner other than those heretofore called to this Court's attention by its Petition for Certiorari. In its Petition to this Court for Writ of Certiorari it called to this Court's attention every ground that it had, substantial or otherwise.

PROPOSITION II

The statements contained in the Van-Grisso opinion (attached to Carter's Petition for Rehearing as appendix or exhibit) upon which Carter strongly relies are dicta.

The only statements contained in the *Van-Grisso opinion* from which Carter can obtain any comfort or solace are two in number and simply say:

> "Carter's lease authorized it to produce oil from any point below 4,000 feet from the surface of the land. Van-Grisso's lease authorized it to produce from a well at any point above the 4,000-level. No legal restrictions were imposed upon these contract rights of the parties." (Lines 32 to 36, inclusive, Page 19, Carter's Petition for Rehearing.)

There was involved in the *Van-Grisso case* the validity of an order of the Corporation Commission fixing the allowable production of oil from a 10-acre tract of land, and fixing the amount or percentage thereof to be taken by the Carter Oil Company and Van-Grisso Oil Company.

The Supreme Court of the State of Oklahoma held the order to be invalid for two reasons:

The first reason advanced by the Oklahoma Supreme Court for holding the order of the Commission invalid and void was that Section 52, O.S. Supp. 1949, Sec. 87.1 (a), (b), (c) and (d), did not empower or authorize the Commission to enter such an order because no well-spacing or drilling units had been established by the Commission in the field involved in that action, and since no well-spacing or drilling units had been established that the statute was not sufficient to authorize the Commission to enter an order.

The second reason given by the Supreme Court of the State of Oklahoma for holding said order to be invalid and void was that the order of the Corporation Commission was not supported by any competent evidence.

These are the only two reasons given by the Supreme Court of the State of Oklahoma for holding the order void. The second reason was unnecessary because the court had already held the Commission to be without jurisdiction to enter the order. It was not necessary for the Supreme Court of the State of Oklahoma, in order to find the Commission without jurisdiction to enter an order, to determine the respective rights of the parties to that action to the oil underlying the premises, or to use the expression that it did use as to the respective rights of the parties and that expression as heretofore stated is *dicta* and was not necessary to the decision reached by the Court. The Corporation Commission of the State of Oklahoma has neither statutory nor constitutional authority to decide property rights and made no effort to decide property rights in its order. The expression from the *Van-Grisso opinion* first above set out in this proposition and so strongly relied upon by Carter is not mentioned in the syllabus and is, therefore, not the law of the case.

Corbin v. *Wilkinson*, 175 Okl. 247,
52 P. 2d 45.

PROPOSITION III

The decision in the Van-Grisso case has not become final as the extended time for filing the Petition for Rehearing in said case will not expire until December 7, 1951.

Carter has a yen for citing to this Court in support of its contention decisions that are not in any respect final. The Carter Oil Company and its attorneys are fully aware of the fact that the *Van-Grisso decision* is not final and that the extended time for filing a Petition for Rehearing in that case will not expire until December 7, 1951. We do not believe that this Court should base its decision upon any opinion, that has not yet become final. We do not concede that the *Van-Grisso decision* throws any light upon the issues involved in this action. Such decision even if it does become final in its present form, does not involve the same contract as that involved in the case at Bar.

PROPOSITION IV

Carter's request that: "The decision of this case be withheld to give it opportunity to institute an action in the Oklahoma courts and to secure an answer to the issues herein raised from the court of final jurisdiction of the State of Oklahoma", should be rejected by this Court.

This proposition is argued by Carter, commencing at Page 4 and extending through Page 5 of its Petition

for Rehearing. The Carter makes the statement that: "These farm-out contracts are prevalent in practically every producing area in Oklahoma, which is a large producing State. The true interpretation of the contract is important and is a matter of State concern."

This is not a correct statement of fact. Farm-out contracts, such as that involved in the instant case, are not in prevalent use in the State of Oklahoma. A search of the recording offices in every county in the State of Oklahoma would very probably not disclose such a farm-out agreement except those found of record in Grady County, Oklahoma, where the land involved in this controversy is located. There are probably some six or seven farm-out agreements similar at least, although not exactly like the farm-out agreement involved in this action. Most of these were executed by Carter Oil Company and all involved properties in the Carter-Knox field in Grady County, Oklahoma. From the hundreds of farm-out agreements which we have seen involving different oil fields in Oklahoma, these are the first we have ever encountered where leases were assigned as to producing horizons and it is our best judgment that from the thousands of farm-out agreements which the attorneys for Carter Oil Company have seen covering oil fields in the State of Oklahoma and throughout the United States, these are the first assignments they had seen, prior to the commencement of this action, where leases were assigned as to producing horizons instead of as to specific depths.

The only people actually concerned with the construction of the contract involved in this action are the parties to this contract. This is private litigation in which the State of Oklahoma as a State is not interested and which neither involves nor determines a recognized defined public policy of the State of Oklahoma, nor does it have to do with the enforcement of any State statute by any regulatory or administrative body of the State.

If this Court invokes the rule sought by Carter, that is to grant the Writ of Certiorari and to then withhold a decision in this case until such time in the future as the Carter may be able to have an expression of our State Court on the questions involved in this action, it will, in effect, destroy the grant of jurisdiction to the Federal courts found in Section 1332 of the Judicial Code; that is, it will forever put at rest the jurisdiction of the Federal courts in diversity of citizenship cases, leaving only such cases for the Federal courts to determine as may involve a Federal constitutional question, or some question arising under the statutes of the United States.

The mere fact that the problem of ascertaining the State law may often be difficult is not a sufficient ground for a Federal court to decline to exercise its jurisdiction to decide a case properly before it.

Where a Court of Appeals has expressed an opinion as to the law of a State included within the Circuit, the

Supreme Court accepts that construction as being the law of the State and will not reverse the judgment.

See:

Helvering v. *Stuart*, 317 U.S. 154, 87 L. ed. 154.

Furthermore, to hold the decision in the case at Bar in abeyance would deprive McCasland *et al.* of the rights given them under the declaratory judgment statute, under which statute this action was filed and tried (28 U.S.C.A. 2201).

Counsel for Carter would have this Court believe that the decision rendered by the Court of Appeals in the case at Bar affects the oil and gas business of the State of Oklahoma as a whole. This is not true. This case has been in court for approximately two years and Carter and its counsel knew for approximately two years before the filing of this action that McCasland *et al.*, were contending, as they are in the case at Bar, and notwithstanding this fact, Carter made no effort to obtain a decision of the court of last resort of the State of Oklahoma on the questions involved in this case. McCasland *et al.* availed themselves of the declaratory judgment statute, as they had a right to do. If this Court should remit the parties to the State Court, as requested by Carter, it would only delay further the disposition of this litigation which has been pending for approximately two years and which is now ripe for decision. Such action would penalize McCasland *et al.*, for resorting to a jurisdiction which they were entitled to invoke.

Briefly, in support of our position that the request for Carter to withhold a decision of this case should be rejected, we cite:

Propper v. *Clark*, 337 U.S. 472, 93 L. ed. 1480;
Helvering v. *Stuart*, 317 U.S. 154, 87 L. ed. 154;
Meredith v. *Winterhaven*, 320 U.S. 227, 88 L. ed. 9;
Williams v. *Green Bay & W. Ry. Co.*, 326 U.S. 549, 90 L. ed. 311;
Estate of Sidney M. Spiegel v. *Commr. of Internal Revenue*, 335 U.S. 701, 93 L. ed. 330.

These cases distinguish the cases cited by Carter in support of its request.

In conclusion, we therefore respectfully submit that Carter's Petition for Rehearing be denied.

Respectfully submitted,

C. D. CUND,
P. O. Box 310,
Duncan, Oklahoma;

CLARENCE McELROY,
Oklahoma National Bank Building,
Chickasha, Oklahoma,
Counsel for Respondents.

OWEN VAUGHN,
Oklahoma National Bank Building,
Chickasha, Oklahoma;

R. H. BROWN,
906½ Main Street,
Duncan, Oklahoma,
Of Counsel.

NOVEMBER, 1951.